Supreme Court, U.S.
FILED
AUG 29 1986
JOSEPH F. SPANIOL, JR.
CLERK

86-326

No.

IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

THE BOARD OF EDUCATION OF THE OKLAHOMA CITY PUBLIC SCHOOLS, INDEPENDENT DISTRICT NO. 89, OKLAHOMA COUNTY, OKLAHOMA, a Public Body Corporate,
Petitioner,

v.

ROBERT L. DOWELL, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

RONALD L. DAY *
FENTON, FENTON, SMITH, RENEAU & MOON
200 Court Plaza Bldg.
228 Robert S. Kerr Ave.
Oklahoma City, OK 73102-5281
(405) 235-4671

REX E. LEE
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 429-4000
Counsel for Petitioners

* Counsel of Record

August 29, 1986

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTIONS PRESENTED

1. When a dual school system acting under a court ordered desegregation plan satisfies its affirmative duty to desegregate and eliminate racial discrimination from the system, what is the legal significance of a finding that the school system has achieved "unitary" status in a final order terminating jurisdiction?

2. Following a district court's finding that a dual school system has achieved "unitary" status in a final order terminating jurisdiction, must a showing of discriminatory intent be made by parties challenging the "unitary" school system's new neighborhood elementary school plan which curtails compulsory bussing?

LIST OF PARTIES

Other parties, in addition to those listed in the caption, are as follows:

Vivial C. Dowell	Yvonne Monet Elliot
Stephen S. Sanger, Jr.	Donnoil S. Elliot

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioner, The Board of Education of the Oklahoma City Public Schools, Independent School District No. 89, Oklahoma County, Oklahoma, a public body corporate, respectfully prays that a writ of certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit. The Tenth Circuit acknowledges that its holding is in square conflict with the Fourth Circuit's decision in *Riddick* v. *School Board of City of Norfolk*, 784 F.2d 521 (4th Cir. 1986), in which a petition for writ of certiorari has also been filed. See 54 U.S.L.W. 3811 (May 29, 1986) (No. 85-1962).

OPINIONS BELOW

The opinion of the Court of Appeals for the Tenth Circuit is not yet reported, but is reprinted in the appendix. See App., 1a-15a.

The opinion of the United States District Court for the Western District of Oklahoma is reported at 606 F. Supp. 1548 (W.D. Okla. 1985), and is reprinted in the appendix. See App., 18a-34a.

JURISDICTION

The opinion of the United States Court of Appeals for the Tenth Circuit was entered on June 26, 1986. The jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The equal protection clause of the fourteenth amendment to the United States Constitution is involved in this case.

STATEMENT OF THE CASE

Like *Riddick* v. *School Board of City of Norfolk*, 784 F.2d 521 (4th Cir. 1986), *petition for cert. filed*, 54 U.S.L.W. 3811 (May 29, 1986) (No. 85-1962), this case involves a major city school system which operated under a court-supervised desegregation plan for several years and then, following a final judicial decree that the school district had achieved unitariness, voluntarily continued the same plan until intervening demographic changes persuaded the school board to adopt a different plan.

1. In 1972, pursuant to an earlier finding of *de jure* segregation in the Oklahoma City public schools, the federal district court for the Western District of Oklahoma ordered the petitioner, the Oklahoma City Board of Education, to implement a desegregation plan that came to be known as the "Finger Plan." *Dowell* v. *Board of Education of Oklahoma City Public Schools*, 338 F. Supp. 1256 (W.D. Okla.), *aff'd*, 465 F.2d 1012 (10th Cir.), *cert. denied*, 409 U.S. 1041 (1972).

The Finger Plan restructured high school and middle school attendance zones so that each school enrolled both

black and white students. A feeder system assigned students to a high school or middle school based on the elementary attendance zone in which their homes were located. *Dowell*, 338 F. Supp. at 1267.

At the elementary level, schools which previously had served a majority of black students were all converted to fifth year centers, while all other schools served grades one through four. White students attended their neighborhood schools for grades one through four, and were bussed to the former black schools for the fifth grade. Black students, formerly assigned to the schools used as fifth year centers, were split up and bussed to the majority white schools for grades one through four. Black students in the fifth grades attended the fifth year centers which were previously their neighborhood schools. *Id.* at 1268.

Under the Finger Plan, if racial balance existed in a neighborhood zone, or was subsequently achieved through demographic changes, the elementary school in that zone qualified as a K-5 "stand alone" school. When "stand alone" status was achieved, the fifth grade was returned to the neighborhood elementary school, and children were no longer bussed into or out of the neighborhood zone to achieve racial balance. *Id.*[1] The desegregation order required school authorities to refer "[a]ny proposed changes" in the plan to the Biracial Committee, a court appointed agency, "for comment and recommendation to the court." *Id.* at 1273. In 1972, the district court found that the Finger Plan, if implemented in good faith, would create a "unitary system." The court assured all parties that its jurisdiction would be "continuous until it [was] clear that disestablishment of the dual system [was] complete." *Id.* at 1271.

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[1] It was the K-5 "stand alone" school feature in the plan which many years later proved inequitable due to intervening demographic changes in Oklahoma City.

2. The judicial determination that "disestablishment of the dual system [was] complete" occurred in 1977. After the petitioner had successfully implemented the Finger Plan for several years, it filed a "Motion to Close Case" on the grounds that it "[had] eliminated all vestiges of state-imposed racial discrimination in its school system, and [was] . . . operating a unitary school system." The district court entered an order directing the plaintiffs to respond to the Board's motion. The plaintiffs filed a response opposing it.

Following a hearing in which evidence was received from both parties concerning the state of desegregation in Oklahoma City, the district court entered an order terminating the case on January 18, 1977. App., 35a-36a. The district court specifically found that a "unitary system" had been "accomplished" over the sixteen years during which the case had been pending before the court. *Id.* at 36a. The court recognized that the School Board had become "sensitized to the constitutional implications of its conduct," and that the Board had "a new awareness of its responsibility to citizens of all races." *Id.* at 36a. Thus, the court, through its order, released the Board "to pursue in good faith its legitimate policies without the continuing constitutional supervision of [the] [c]ourt . . . ." *Id.* at 36a.

The "Order Terminating Case" was not appealed and became final. No attempt to revive or reopen this case was made during the years from the time the district court found the system unitary and terminated jurisdiction in 1977 until the present contest.[2]

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[2] The district court in 1977 did not, as the court of appeals suggests, merely "termina[e] . . . active supervision." *See* App., 2a-3a. As the district court itself observed in 1985, "[a]t the time [the] court *totally relinquished* its *jurisdiction* over [the] case in 1977, the court was convinced that the Finger Plan had been carried out in a constitutionally permissible fashion and that the school district had reached the goal of being a desegregated non-racially operated

3. After the case was closed and jurisdiction terminated in 1977, the petitioner continued to follow the general substance of the Finger Plan for another eight years. However, in 1984 it became apparent to the Board that certain inequities, directly linked to the K-5 "stand alone" school concept, were starting to surface. The Board appointed a special committee to study the "stand alone" concept.

The 1972 plan had authorized K-5 "stand alone" schools where racial balance in the neighborhood zone either existed or was subsequently obtained as a result of demographic changes. When K-5 "stand alone" status was granted, young blacks were no longer bussed into the zone to achieve racial balance, and the fifth grade was returned to the K-4 elementary school in the zone. The committee found that after the plan was implemented in 1972, demographic changes slowly took place which brought more and more neighborhoods, especially those in central Oklahoma City, into racial balance. In 1984, as a result of these demographic changes there were more than a dozen elementary schools in Oklahoma City neighborhoods which had a racial balance qualifying them for K-5 "stand alone" status.[3]

The committee's study revealed that if K-5 "stand alone" status were granted to the ever-increasing num-

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and *unitary* school system." *Dowell* v. *Board of Education of Oklahoma City Public Schools*, 606 F. Supp. 1548, 1554 (W.D. Okla. 1985) (emphasis added).

In any event, the court of appeals' purported disagreement with the district court over the characterization of the district court's earlier order is rendered insignificant by the court of appeals' acknowledgement that its holding concerning the effect of a determination of unitariness is in square conflict with the Fourth Circuit's holding in *Riddick* v. *School Board of City of Norfolk*, 784 F.2d 521 (4th Cir. 1986).

[3] It was one such school, Bodine Elementary School, seeking K-5 "stand alone" school status in 1984, which ultimately prompted the Board to appoint the committee to study the problem.

ber of elementary schools which qualified, then the young black students, previously bussed into those schools primarily from the northeast part of Oklahoma City, would have to be reassigned to more distant schools. Since most of the racially balanced neighborhoods are centrally located in Oklahoma City, the reassignment of young blacks would have to be to schools located further north, west or south.[4] The obvious result would be to increase the bussing burden, in terms of time and distance, on young black children in grades one through four.[5]

After the committee made its report and public hearings were conducted at various schools throughout the community, the petitioner unanimously adopted, pursuant

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[4] Further, the committee pointed out that when a "stand alone" school reacquired its fifth grade, this caused the student population at the fifth year centers located in the northeast quadrant of the district to drop. Under school district guidelines, if enrollment dropped below a certain level, the school was subject to closing. The ultimate effect would be to leave the northeast part of the city, a predominately black part of the community, without schools. All fifth year centers had enrichment programs which included intramurals, string instruments, special interest sessions, and the "Opening Doors" Program. The committee found that it would be increasingly difficult to make these special fifth year center programs equally available to all of the potential K-5 "stand alone" schools.

[5] Respondents called the author of the Finger Plan, Dr. John Finger, as one of their expert witnesses at the trial. During cross-examination, he admitted that less bussing of young blacks in Oklahoma City was justified, and should have taken place sometime ago. (T. 297) Even in a confirmed dual system where school authorities are struggling to satisfy their affirmative desegregative obligations, which is no longer the case in Oklahoma City, "[a]n objection to transportation of students may have validity when the time or distance of travel is so great as to either risk the health of the children or significantly impinge on the educational process." *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 30-31 (1971). And, "limits on time of travel will vary with many factors, but probably with none more than the age of the students." *Id.*

to the committee's recommendation, a new student assignment plan calling for neighborhood schools at the elementary level.[6] The new plan eliminated the K-5 "stand alone" school concept and called for K-4 neighborhood schools throughout the district. This eliminated compulsory bussing of young black children to elementary schools outside their immediate neighborhood. The plan placed fifth year centers, previously located in only the northeast quadrant of the city, into all sections of the school district. Under the plan, all fifth year centers, middle schools and high schools continue to be racially balanced through compulsory bussing.

The neighborhood school plan did result in the creation of some racially identifiable elementary schools. However, the plan incorporates features which foster desegregation. The plan's "majority to minority" transfer provision, for example, allows the parents of any elementary students assigned to a school where their race is in the majority to obtain a transfer to a school where their race will be in the minority. This transfer option is encouraged through district-provided transportation.[7]

Also, under the neighborhood school plan the faculty and staff at all elementary schools remain racially balanced.[8] An equity officer is used in the new plan to

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[6] The Board's action adopting the plan was supported by a "majority of the community" (T. 32), including the black community. (T. 432-436)

[7] The "majority to minority" transfer option is a recognized desegregation tool. *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 26-27 (1971); *Board of Education of Oklahoma City Public Schools* v. *Dowell*, 375 F.2d 158, 167-68 (10th Cir. 1967).

[8] Thus, young black students continue to have contact with and the opportunity to learn from white teachers, and conversely, white students continue to have similar opportunities to meet, know and learn from black teachers. Interaction of this nature is desirable, and does not occur in truly segregated schools. *Columbus Board of Education* v. *Penick*, 443 U.S. 449, 467 (1979). "In addition to

monitor all schools to insure the equality of facilities, equipment, supplies, books and instruction. An equity committee assists the equity officer and recommends ways to integrate students at any racially identifiable elementary school. There are no one-race schools as a result of the plan.

4. The respondents attacked the 1985 plan by seeking to reopen the earlier case. They alleged that Oklahoma City Public Schools had not achieved unitary status, and that the neighborhood school plan "resegregated" the school district in violation of the Constitution.[9] The School Board responded to the motion contending that unitary status had been achieved and that the plan was constitutional.

The district court, in accordance with the principles of issue preclusion announced in *Allen* v. *McCurry*, 449 U.S. 90, 97-99 (1980), held that its final order finding the school system unitary in 1977 barred relitigation of the unitary character of the school system "as of 1977." *Dowell* v. *Board of Education of Oklahoma City Public Schools*, 606 F. Supp. 1548, 1555 (W.D. Okla. 1985). The court pointed out that *Green* v. *County School Board*, 391 U.S. 430, 435 (1968) requires six separate components of a school system to be non-discriminatory before total unitary status can exist and found from the evidence that all six components of the Oklahoma City School District (faculty, staff, transportation, extra-curricular ac-

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the racial and ethnic composition of a school's student body, other factors, such as the racial and ethnic composition of the faculty and staff and the community and administration attitudes toward the school, must be taken into consideration" in determining whether or not a system is governed by *de jure* segregation. *Keyes* v. *School District No. 1*, 413 U.S. 189, 196 (1973).

[9] Respondents admitted, in a subsequent motion and brief seeking to stay implementation of the plan, that they were attacking the "constitutionality" of the neighborhood school plan in their motion to reopen the earlier case.

tivities, facilities, and composition of the student body) remained nondiscriminatory in 1985. *Dowell*, 606 F. Supp. at 1555. Thus, the court concluded that the school district "displays today, as it did in 1977, all indicia of 'unitariness.'" *Id.*

The court noted the specific pronouncement in *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 32 (1971), that a district court's intervention subsequent to the achievement of unitary status was not anticipated by this Court "unless there is a showing that . . . school [authorities] . . . 'ha[d] *deliberately attempted* . . . to *affect* the *racial composition* of [its] schools'" and directed its attention to whether the neighborhood school plan was "created for the purpose of discriminating on the basis of race" in violation of the Constitution. *Dowell*, 606 F. Supp. at 1556 (emphasis added).

The court found that the neighborhood school plan was *not* adopted by the Oklahoma City Board of Education "with the intent to discriminate on the basis of race or with a deliberate purpose to affect the racial composition of [its] schools." *Dowell*, 606 F. Supp. at 1554. Rather, the court found that "[a]ny change in the racial composition of the schools that may be expected to result from the plan is an unintended and largely unavoidable consequence of other objectives sought for the benefits of all students." [10] *Id.*

The court of appeals reversed and remanded, notwithstanding its holding that "the trial court properly refused to permit the plaintiffs to relitigate conditions extant in 1977," because the 1977 finding of "unitariness within

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[10] The "other objectives" were: "to protect against the loss of schools in the northeast quadrant of the district; to maintain fifth year centers throughout the district; to reduce the busing burden on young black students; to increase parental and community involvement in the schools; and to improve programs and provide elementary children with a greater opportunity for participation in extracurricular activities." *Dowell*, 606 F. Supp. at 1553-54.

the district . . . became final, and . . . [was] binding upon the parties." App., 12a. The court of appeals also recognized that "[w]hen the district court terminated active supervision over this case, it acknowledged that the original purpose of the lawsuit had been achieved and that the parties had implemented a means for maintaining that goal." *Id.* at 9a.

In the court of appeals' view, this case is just like any other in which "the injunctive order must survive beyond the procedural life of the litigation," *id.* at 10a, so that any attempt by the school board to change its plan is subject to contempt. Under this view, the finding that the school district has achieved unitary status appears to count for very little. As the court of appeals' opinion states: "We therefore see no reason why this case should be treated differently from any other case in which the beneficiary of a mandatory injunction seeks enforcement of the relief previously accorded by the court." [11] *Id.* at 9a. Thus, the court of appeals reasoned that "by placing the burden on the plaintiffs to show the school district was no longer unitary, the [district] court changed the usual course of what in reality is a petition for a contempt citation." *Id.* at 15a.

The unitary school district's burden, the Tenth Circuit ruled, is to prove that the dangers prevented by the 1972 injunction "have become attenuated to a shadow," and that changed circumstances had produced "hardship so extreme and unexpected as to make the decree oppressive," if the neighborhood school plan is to survive. App.,

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[11] While the Tenth Circuit relied on *Securities & Exchange Commission* v. *Jan-dal Oil & Gas, Inc.*, 433 F.2d 304, 305 (10th Cir. 1970), and *EEOC* v. *Safeway Stores, Inc.*, 611 F.2d 795, 800 (10th Cir. 1979), *cert. denied*, 446 U.S. 952 (1980), *see* App., 10a-11a, neither *Jan-dal* nor *Safeway* was a desegregation case, and there is no aspect of either case analogous to a judicial determination of unitariness.

11a. Thus, the court concluded that the district court "improperly recast the burden of proof" upon respondents [12] and erred in searching the record, for "discriminatory intent." The Tenth Circuit acknowledged that "[t]he Fourth Circuit has taken a different view with which we cannot agree." The reason for the disagreement is that "[t]he [Fourth Circuit] makes a bridge between a finding of unitariness and voluntary compliance with an injunction. We find no foundation for that bridge." App., 8a.

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[12] The court of appeals ruled that when the district court "improperly recast the burden of proof," it left respondents unprepared to try the "substantive issue." *See* App., 15a. However, the record shows that respondents were prepared to try the merits. Prior to the trial, the district court allowed respondents to pursue extensive discovery on the merits. At the commencement of the trial, the court inquired if there was a question as to which side had the burden of proof. Lead counsel for respondents, without even suggesting that defendants had the burden, informed the court "we're prepared to start first." (Tr. 6) Respondents called many witnesses, including two experts, who testified on the merits. Additionally, when responding to an objection, counsel for respondents told the court that "in order to deal with the question of [discriminatory] intent, we've got to put on some probative evidence on that subject." (T. 164-165)

Throughout the 1985 trial, the court reminded respondents that the issue before the court was the "constitutionality" of the plan. (T. 165, 232, 264, 266, 270-71) In response to the court's statements, respondents neither objected, nor denied that the "constitutionality" of the plan was the issue for resolution. Respondents never told the court they were not prepared to try the constitutionality of the plan, and at no time moved for a continuance in order to prepare to meet the issue. In fact, when respondents rested their case, the court inquired if they were "satisfied [they] had a fair hearing." Their counsel responded, "yes, sir." (T. 303) The transcript reveals that respondents knew well they were litigating the constitutionality of the plan, that they attempted to prove discriminatory intent upon their own initiative, and that they received a fair and complete opportunity to present their case. It was only after the court concluded that the plan was constitutional that it denied respondents' motion to reopen the case.

REASONS FOR GRANTING THE WRIT

I. THE TENTH CIRCUIT'S DECISION IS IN DIRECT CONFLICT WITH THE FOURTH CIRCUIT'S DECISION IN *RIDDICK* ON THE SAME IMPORTANT QUESTION

Probably the most important unresolved constitutional question concerning school desegregation is the one squarely presented by this case and *Riddick* v. *School Board of City of Norfolk*, 784 F.2d 521 (4th Cir. 1986) in which a petition for writ of certiorari has been filed. 54 U.S.L.W. 3811 (May 29, 1986) (No. 85-1962). The holdings of the two cases are in square conflict, and the Tenth Circuit expressly acknowledged the conflict.[13] The conflict cannot be left unresolved.[14] The issue is too important to have the constitutional rights of those who attend our nation's schools and those who administer them depend on the fortuity of the part of the country in which the school happens to be located.

Fifteen years have elapsed since this Court "defin[ed] in more precise terms . . . the scope of the duty of school

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[13] The Tenth Circuit held that the pertinent inquiry is not whether unitary status has been achieved, but rather, whether the termination order vacates the desegregation decree. The Fourth Circuit, by contrast, held that the achievement of unitary status, signifying the elimination of unlawful segregation, is the controlling inquiry, regardless of whether the order dissolves the original decree. Under the Fourth Circuit's analysis, parties challenging a unitary school system's neighborhood school plan have the burden of proving discriminatory intent. Yet, under the same circumstances, the Tenth Circuit places the burden upon the unitary school district to prove the justification of its proposed plan. The two decisions could not be more diametrically opposed.

[14] The Tenth Circuit's decision also conflicts in principle, we submit, with the Ninth Circuit's holding in *Spangler* v. *Pasadena City Board of Education*, 611 F.2d 1239 (9th Cir. 1979). If as *Spangler* held (following remand by this court) a plaintiff cannot expand desegregation relief beyond that prescribed by the initial decree without bearing the burden of proof, neither can the plaintiff bring federal courts back into the business of supervising school districts without a new finding of discrimination.

authorities and district courts in implementing *Brown I*." *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 6 (1971). The time has now come when further clarification is required. The issue here and in *Riddick* will arise whenever demographic changes follow a decree of unitariness. As this Court observed in *Swann*, few communities served by school districts with newly acquired unitary status "will remain demographically stable." *Swann*, 402 U.S. at 31. Oklahoma City and Norfolk are two perfect examples. Demographic shifts in each community prompted legitimate changes long after unitary status was achieved. Such demographic shifts will inevitably continue to occur in the ever-increasing number of unitary school systems across this country. Sooner or later, those school systems will be faced with the same type of decisions which were made in Norfolk and Oklahoma City. Those school districts, and the district courts litigating the validity of their decisions, need definite guidance from this Court articulating the obligations of a school system which has achieved unitary status.

Because the need for a decision by this Court is beyond serious dispute, the only significant issues are whether the Court should grant both petitions, or only one, and if only one, which it should be.

It should be helpful to the Court to have the facts of both cases before it. Most of the relevant facts in the two petitions are remarkably similar. There are some differences, however, that will aid the Court in working out the respective roles of federal courts and school boards following a final decree that a school system has successfully progressed from dual to unitary.

Both the Oklahoma City and the Norfolk School Boards changed their plans years after securing their unitariness decrees. In *Riddick* the dominant consideration was the prevention of white flight. Here, white flight played no role. There is also a significant difference in the con-

tent of the two orders returning control to the school boards. The Norfolk order provides that the case may be reopened on a showing of good cause. *Riddick* v. *School Board of City of Norfolk*, 627 F. Supp. 814, 818 (E.D. Va. 1984). There is no such provision in the Oklahoma City order.

Even if there were no differences in the facts of the two cases, the legal issues are sufficiently important to warrant full consideration of the briefs and arguments of two sets of counsel concerning the responses of two major school boards to the recurring circumstance of a unitariness decree followed by demographic change.

In the event the Court decides to grant only one petition, it should be this one. For reasons discussed in Part II, it is the Tenth Circuit that erred. The Fourth Circuit did not. Moreover, there is probably no school district in the country whose facts and circumstances highlight the problems of demographic change following a unitariness decree more adequately than this petitioner, which is one of the largest in the nation. The petitioner's geographical boundaries cover more than 800 square miles, spanning two counties and several municipalities in addition to Oklahoma City.

II. THE TENTH CIRCUIT RULED ON AN IMPORTANT UNSETTLED QUESTION OF CONSTITUTIONAL LAW, AND IN DOING SO EMPLOYED CONCEPTS INCONSISTENT WITH FUNDAMENTAL PRINCIPLES PREVIOUSLY ANNOUNCED BY THIS COURT

Following a determination that a school district has operated a dual school system, the sole objective for both the school board and the courts is to convert the dual system to a unitary one. This Court in *Green* v. *County School Board*, 391 U.S. 430, 437-38 (1968), clarified that under *Brown*'s mandate "[s]chool boards . . . then operating state-compelled dual systems were . . . clearly

charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch." "[O]nce the affirmative duty to desegregate has been accomplished and racial discrimination through official action is eliminated" the school system becomes "unitary." *Swann*, 402 U.S. at 32. It follows that the remedy is designed to operate during the "*interim period* when remedial adjustments are being made to eliminate the dual school systems." *Swann*, 402 U.S. at 28 (emphasis added).

The task of determining whether and when unitariness has been achieved is for the courts. The judge in a desegregation case has no more important responsibility than to assist in achieving unitariness and to determine when it has occurred.

The transition to unitariness, therefore, is the pivotal event and the ultimate objective for a dual system. Once it is achieved, the achievement has to count for something. The Fourth Circuit's holding provides real incentive for a school district to become unitary.[15] The Tenth Circuit makes that event of nothing more than symbolic significance.

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[15] The harsh burden imposed by the Tenth Circuit can only serve to have a chilling effect on legitimate changes in educational policy and to defeat important governmental and personal interests. A school board will be obligated under the governance of a continuing decree to take racial factors into account in making important policy decisions long after discrimination has been eliminated. Since the school system has been unitary for many years, the only justification for the heavy burden imposed by the Tenth Circuit is the *past* history of discrimination in Oklahoma City. While the history of discrimination in Oklahoma City should not be ignored, in an inquiry as to whether the city has intended discrimination, it "cannot, in the manner of original sin, condemn governmental action that is not itself unlawful." *City of Mobile* v. *Bolden*, 446 U.S. 55, 74 (1980).

This is not a case where a district court terminated active supervision without finding that the school system had achieved unitary status.[16] Nor is this a case where a district court alluded to unitariness, but ordered the Board to continue to file statistical reports on an established schedule without dismissing the case.[17] Rather, this is a case where the twin goals of *Swann*—the achievement of a unitary system *and* court disengagement were obtained simultaneously more than nine years ago.

The Tenth Circuit's assertion that the district court "erred in curtailing the presentation of evidence of changes that have . . . occurred [since 1977]" (App., 12a) is simply wrong. The district court received evidence, and that evidence supported the finding that the school system was still unitary. The plaintiffs also presented evidence, and the district court would have permitted them to put forward any relevant evidence, under its standard, which imposed the burden of proof on them.

By placing the burden of proof on a unitary school district, the Tenth Circuit overlooked the differentiating factor between *de jure* segregation and *de facto* segregation, which is the "*purpose* or *intent* to segregate." *Keyes* v. *School District No. 1*, 413 U.S. 189, 208 (1973) (emphasis in original); *Swann*, 402 U.S. at 17-18. *Keyes* reaffirmed *Swann's* clarification that "at some point in time the relationship between past segregative acts and present segregation may become so attenuated as to be incapable of supporting a finding of *de jure* segregation warranting judicial intervention." *Keyes*, 413 U.S. at 211. Thus, *Swann* and *Keyes* teach that subsequent to the achievement of unitary status the *de facto/de jure*

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[16] *Compare Vaughns* v. *Board of Education of Prince George's County*, 758 F.2d 983, 987 (4th Cir. 1985).

[17] *Compare Lee* v. *Macon County Board of Education*, 584 F.2d 78, 81 (5th Cir. 1978).

distinction comes back into play, thus mandating a search for "discriminatory purpose or intent." Therefore, "[t]he duty of both the District Court and the Court of Appeals in a case such as this, where mandatory segregation by law of the races in the schools has long since ceased, is to first determine whether there was any action in the conduct of the business of the school board which are intended to, and did in fact, discriminate against minority pupils, teachers, or staff." *Dayton Board of Education* v. *Brinkman*, 433 U.S. 406, 420 (1977) (*Dayton I*).

The Tenth Circuit's decision infers that the neighborhood school plan, which results in some racially identifiable schools, "*appears* to have the same segregative effect as the attendance plan which generated the original lawsuit." App., 13a. Yet, the existence of "either predominantly white or predominantly black" schools in a community, "without more, . . . does not offend the Constitution." *Dayton I* at 417. This Court has specifically ruled that "a neighborhood school policy in itself is not violative of the Constitution." *Crawford* v. *Los Angeles Board of Education*, 458 U.S. 527, 537 n.15 (1982). *Accord*, *Swann*, 402 U.S. at 28. A neighborhood school policy violates the Equal Protection Clause only when its adoption is motivated by a discriminatory purpose. The failure of the Tenth Circuit to afford unitary status the meaning intended by this Court left its decision at odds with fundamental constitutional principle, and resulted in the erroneous conclusion that "discriminatory intent" is not the pertinent inquiry.

In a single decision, the Tenth Circuit emasculated all meaning that this Court methodically gave to the achievement of unitary status in its decisions from *Brown I* to date. The issue is sufficiently important, and the facts of this case and *Riddick* sufficiently diverse, to warrant plenary review of both.

CONCLUSION

For the foregoing reasons, the Petition for Certiorari should be granted.

Respectfully submitted,

RONALD L. DAY *
FENTON, FENTON, SMITH,
RENEAU & MOON
200 Court Plaza Bldg.
228 Robert S. Kerr Ave.
Oklahoma City, OK 73102-5281
(405) 235-4671

REX E. LEE
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 429-4000

Counsel for Petitioners

* Counsel of Record

August 29, 1986

APPENDICES

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 85-1886

ROBERT L. DOWELL, an infant under the age of 14 years, who sues by A.L. Dowell, his father as next friend,
Plaintiff-Appellant,

VIVIAL C. DOWELL, a minor, by her father, A.L. DOWELL, as next friend, *et al.*,
Intervening Plaintiffs-Appellants,

STEPHEN S. SANGER, JR., on behalf of himself and all others similarly situated, *et al.*,
Intervening Plaintiffs,

and

YVONNE MONET ELLIOT and DONNOIL S. ELLIOT, both minor children, by and through their parent and guardian, DONALD R. ELLIOT, *et al.*,
Applicants in Intervention-Appellants,

vs.

THE BOARD OF EDUCATION OF THE OKLAHOMA CITY PUBLIC SCHOOLS, INDEPENDENT DISTRICT NO. 89, OKLAHOMA COUNTY, OKLAHOMA, a Public Body Corporate, *et al.*,
Defendants-Appellees.

[Filed June 26, 1986]

Appeal From the United States District Court
for the Western District of Oklahoma
(D.C. No. CIV-9452)

Theodore A. Shaw (Julius LeVonne Chambers and Napoleon B. Williams, Jr., with him on the briefs), New York, New York; John W. Walker, Little Rock, Arkansas; and Lewis Barber, Jr., of Barber/Traviolia, Oklahoma City, Oklahoma; for Plaintiffs and Applicants in Intervention-Appellants.

Ronald L. Day of Fenton, Fenton, Smith, Reneau & Moon, Oklahoma City, Oklahoma, for The Board of Education of the Oklahoma City Public Schools, Independent District No. 89, Oklahoma County, Oklahoma, Defendant-Appellee.

William Bradford Reynolds, Assistant Attorney General, Walter W. Barnett, Mark L. Gross, and Michael Carvin, Attorneys, Department of Justice, Washington, D.C., filed an Amicus Curiae brief for the United States of America.

Before MOORE and ANDERSON, Circuit Judges, and JOHNSON, District Judge.*

MOORE, Circuit Judge.

This appeal is the latest chapter in the odyssey of the desegregation of the public school system in Oklahoma City, Oklahoma. After many years of litigation, in 1977 the trial court found that the school district had achieved unitariness and entered an order terminating the court's

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* Honorable Alan Johnson, United States District Judge for the District of Wyoming, sitting by designation.

active supervision of the case. The parties are now before this court after an unsuccessful attempt to enjoin the school district from altering the attendance plan previously mandated by the district court. The district court, in part relying on its 1977 termination order, not only denied the petitioners' motion to reopen the case, but also decided the issue of the constitutionality of the new attendance plan. *Dowell v. School Board of Oklahoma City Public Schools*, 606 F. Supp. 1548 (W.D. Okla. 1985). In this appeal, we address only the precise question of whether the trial court erred in denying the motion to reopen. We hold, under the facts present here, that the court erred and remand for additional factual determinations.

I.

This case was filed in 1961, and the history of the litigation is extensive.[1] In the ensuing years, the parties struggled through the difficult task of desegregating the public schools, each proffering plans to accomplish that goal. Finally, after finding the district had "emasculate[d]" a previously approved plan, the district court ordered the implementation of the so-called "Finger Plan." *Dowell v. School Board of Oklahoma City Public Schools*, 338 F. Supp. 1256, 1263 (W.D. Okla.), *aff'd*, 465 F.2d 1012 (10th Cir.), *cert. denied*, 409 U.S. 1041 (1972). That plan, which was instituted during the 1972-1973 school year, restructured attendance zones for high schools and middle schools so that each level enrolled black and white students. At the elementary level, all schools with a majority of black pupils became fifth grade centers which provided enhanced curricula. All

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[1] *See Dowell v. School Board of Oklahoma City Public Schools*, 219 F. Supp. 427 (W.D. Okla. 1963); *Dowell v. School Board of Oklahoma City Public Schools*, 430 F.2d 865 (10th Cir. 1970); *Dowell v. School Board of Oklahoma City Public Schools*, 338 F. Supp. 1256 (W.D. Okla.), *aff'd*, 465 F.2d 1012 (10th Cir.), *cert. denied*, 409 U.S. 1041 (1972).

elementary schools with a majority of white students were converted to serve grades one through four. Generally, the white students continued to attend neighborhood schools while black students in grades one through four were bused to classes. When white students reached the fifth grade, they were bused to the fifth grade centers, while black fifth graders attended the centers in their neighborhoods. Schools which were located in integrated areas qualified as "stand alone schools," and the students in grades one through five remained in their own neighborhoods.

In June 1975, the school board moved to close the case on the ground that it had "eliminated all vestiges of State-imposed racial discrimination in its school system, and [that it was] . . . operating a unitary school system." Although the motion was contested, the court terminated active supervision of the case because it found the Finger Plan had achieved its objective. *Dowell v. School Board of Oklahoma City Public Schools*, No. CIV-9452, slip op. (W.D. Okla. Jan. 18, 1977). *See Dowell*, 606 F. Supp. at 1551 (quoting the unpublished order in part). The order was not appealed. The 1977 order did not vacate or modify the 1972 order mandating implementation of the Finger Plan.

In February 1985, the plaintiffs sought to reopen the case, claiming the school board unilaterally abandoned the Finger Plan and instituted a new plan for school attendance. The Student Reassignment Plan, which has already been implemented, eliminates compulsory busing of black students in grades one through four and reinstitutes neighborhood elementary schools for these grades. Free transportation is provided to children in the racial majority in any school who choose to transfer to a school in which they will be in the minority. The racial balance of fifth grade centers, middle schools, and high schools is maintained through mandatory busing. As a result of this plan, thirty-three of the district's sixty-

four elementary schools are attended by students who are ninety percent, or more, of one race.

The district court denied the motion to reopen.[2] The court held that the Student Reassignment Plan was not constitutionally infirm and, therefore, no "special circumstances" were present that would justify reopening the case. *Dowell*, 606 F. Supp. at 1557. The court concluded as a matter of law: (1) The principles of res judicata and collateral estoppel prohibit the plaintiffs from challenging the court's 1977 finding that the school system was unitary. (2) The 1985 school district displays all indicia of unitariness. (3) Neighborhood schools, when impartially maintained and administered, are not unconstitutional. Moreover, the existence of racially identifiable schools, without a showing of discriminatory intent, is not unconstitutional. (4) The Student Reassignment Plan is not discriminatory and was not established with discriminatory intent.

On appeal, the plaintiffs contend the trial court erred in arriving at these conclusions without reopening the case and without giving them an adequate opportunity to present evidence on the substantive issues. We agree and hold that, while the principles of res judicata may apply in school desegregation cases, a past finding of unitariness, by itself, does not bar renewed litigation upon a mandatory injunction. Moreover, when it is al-

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[2] Plaintiffs contend that the district court erred in not specifically granting their motion to intervene. Nevertheless, the court held those who sought intervention were within the ambit of the orginal plaintiff class, and those persons, through their counsel, actively participated in the hearing to reopen. They were clearly treated as party litigants even though a formal order granting them intervention was not entered. Indeed, at the outset of the hearing, the court stated that the parties "did meet the requirement to be a plaintiff." As a practical matter, the appealing parties were allowed to intervene despite the order denying all relief prayed for; therefore, within the peculiar context of this case, we conclude the issue is moot and the appealing persons are proper parties.

leged that significant changes have been made in a court-ordered school attendance plan, any party for whose benefit the plan was adopted has a right to be heard on the issue of whether the changes will effect the unitariness of the system. In such circumstances, it is not necessary for the party seeking enforcement of the injunction to prove the changes were motivated by a discriminatory intent. Accordingly, we conclude the trial court erred in not reopening the case.

II.

A.

Any analysis of the legal principles governing this case must start with the procedural framework in which it was postured when the plaintiffs sought to reopen. When the defendant board adopted the Student Reassignment Plan, the 1972 order approving the Finger Plan and ordering its immediate implementation still governed the parties. That order was in the nature of a mandatory injunction, and the effect of that order was not altered by the 1977 order terminating the court's active supervision of the case.

Perhaps the members of the present school board acted upon the belief that the 1972 order was no longer effective; if so, their belief was unwarranted. Indeed, the 1972 order specifically provided:

> The Defendant School Board and the individual members thereof, *both present and future*, together with the Superintendent of Schools, shall implement and place [the Finger Plan] into effect . . . .
>
> The Defendant School Board shall not alter or deviate from the [Finger Plan] . . . without the prior approval and permission of the court. If the Defendant is uncertain concerning the meaning of the plan, it should apply to the court for interpretation and clarification.

Dowell, 338 F. Supp. at 1273 (emphasis added).

Nothing in the 1977 order tempered the 1972 mandatory injunction. In fact, the 1977 order states:

> The Court has concluded that . . . [the Finger Plan] was indeed a Plan that worked and that substantial compliance with the constitutional requirements has been achieved. The School Board, under the oversight of the Court, has operated the Plan properly, and the Court does not foresee that the termination of its jurisdiction will result in the dismantlement of the Plan or any affirmative action by the defendant to undermine the unitary system so slowly and painfully accomplished over the 16 years during which the cause has been pending before the Court.
>
> . . . The Court believes that the present members *and their successors* on the Board will now and in the future continue to follow the constitutional desegregation requirements.

Dowell, No. CIV-9452, slip op. at 1 (W.D. Okla. Jan. 18, 1977) (emphasis added).

In light of these statements reinforcing the importance of the remedial injunction and the lack of any specific or implied alteration of that remedy, we must conclude the court intended the 1972 order to retain its vitality and prospective effect. Therefore, the competing interests of both parties must be assessed first within the penumbra of the outstanding 1972 order. To do otherwise renders all of what has occurred since 1961 moot and mocks the painful accomplishments of sixteen years of litigation and active court supervision.

As amicus, the government argues that once a finding of unitariness is entered, all authority over the affairs of a school district is returned to its governing board, and all prior court orders, including any remedial busing order, are terminated. According to the government, the defendants could not be compelled to follow the

Finger Plan once the court determined the district was unitary. We find the contention without merit. The parties cannot be thrust back to the proverbial first square just because the court previously ceased active supervision over the operation of the Finger Plan.

While there are sound reasons for courts to seek the earliest opportunity to return control of school district affairs to the local body elected for that purpose, those reasons do not require abandonment of the inherent equitable power of any court to enforce orders which it has never vacated. The court's authority is not diminished once the original case has been closed because the viability of a permanent injunction does not depend upon this ministerial procedure. *See Ridley v. Phillips Petroleum Co.*, 427 F.2d 19 (10th Cir. 1970). Therefore, termination of active supervision of a case does not prevent the court from enforcing its orders. If such were the case, it would give more credence to the ministerial function of "closing" a case and less credence to the prospective operation of a mandatory injunction.[3] *See Berman v. Denver Tramway Corp.*, 197 F.2d 946 (10th Cir. 1952).

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[3] The Fourth Circuit has taken a different view with which we cannot agree. In *Riddick v. The School Board of the City of Norfolk*, No. 84-1815, slip op. (4th Cir. 1986), the court seems to treat a district court order terminating supervision as an order dissolving a mandated integration plan, despite the absence of a specific order to that effect. The court makes a bridge between a finding of unitariness and voluntary compliance with an injunction. We find no foundation for that bridge. It also appears inconsistent with *Lee v. Macon County Board of Education*, 584 F.2d 78 (5th Cir. 1978), in which the court held that a finding by the district court that the school system was "unitary in nature" did not divest the court of subject matter jurisdiction of a petition to amend the desegregation plan where the court had not dismissed the case. A finding of unitariness may lead to many other reasonable conclusions, but it cannot divest a court of its jurisdiction, nor can it convert a mandatory injunction into voluntary compliance.

The government's position ignores the fact that the purpose of court-ordered school integration is not only to achieve, but also to *maintain*, a unitary school system. *Keyes v. School District No. 1, Denver, Colo.*, 609 F. Supp. 1491, 1515 (D. Colo. 1985).[4] When the district court terminated active supervision over this case, it acknowledged that the original purpose of the lawsuit had been achieved and that the parties had implemented a means for maintaining that goal. *Dowell*, 606 F. Supp. at 1551 (1977 termination order). However, without specifically dissolving its decree, the court neither abrogated its power to enforce the mandatory order nor forgave the defendants their duty to persist in the elimination of the vestiges of segregation.

We therefore see no reason why this case should be treated differently from any other case in which the beneficiary of a mandatory injunction seeks enforcement of the relief previously accorded by the court. *See Swann*, 402 U.S. at 15-16. When a federal court has restored unsupervised governance to a board of education, the board must, like any other litigant, return to the court if it wants to alter the duties imposed upon it by a mandatory decree. *Vaughns v. Board of Education of Prince George's County*, 758 F.2d 983 (4th Cir. 1985). *See also Pasadena City Board of Education v. Spangler*, 427 U.S. 424 (1976). It is only when the order terminating active supervision also dissolves the mandatory injunction that

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[4] *See also Lee v. Macon County Board of Education*, 584 F.2d 78, 81 (5th Cir. 1978) (after full responsibility for educational decisions has been returned to public school officials by the court, they "are bound to take no actions which would reinstitute a dual school system"); *Graves v. Walton County Board of Education*, 686 F.2d 1135 (11th Cir. 1982), *aff'g in part, rev'g in part*, 91 F.R.D. 457 (M.D. Ga. 1981) (despite an earlier finding that desegregation had been accomplished, the courts reject a modification of the 1968 desegregation plan which would effectively resegregate the system).

the governing board regains total independence from the previous injunction.

B.

The record in this case indicates that the defendants, unilaterally and contrary to the specific provisions of the 1972 order, have taken steps to avoid the duties imposed upon them by a continuing decree. By implementing the Student Reassignment Plan, the defendants have acted in a manner not contemplated by the court in its earlier decrees. The plaintiffs now are simply attempting to reassert the validity of the 1972 order and to perpetuate the duties placed upon the district.

When a party has prevailed in a cause for mandatory injunction, that party has a right to expect that prospective relief will be maintained unless the injunction is vacated or modified by the court. *See W.R. Grace and Co. v. Local 759, International Union of United Rubber Workers of America*, 461 U.S. 757 (1983). *See also GTE Sylvania, Inc. v. Consumers Union of United States*, 445 U.S. 375 (1980). To make the remedy meaningful, the injunctive order must survive beyond the procedural life of the litigation and remain within the continuing jurisdiction of the issuing court. *E.E.O.C. v. Safeway Stores, Inc.*, 611 F.2d 795 (10th Cir. 1979), *cert. denied*, 446 U.S. 952 (1980); 11 Wright & Miller, Federal Practice and Procedure § 2961 (1973). This binding nature of a mandatory injunction is recognized in school desegregation cases. *Pasadena City Board of Education v. Spangler*, 427 U.S. 424, 439 (1976).

Thus, the beneficiary of a mandatory order has the right to return to court to ask for enforcement of the rights the party obtained in the prior litigation. To invoke the court's authority, the party seeking enforcement must establish that the injunctive decree is not being obeyed. *Northside Realty Associates, Inc. v. United States*, 605 F.2d 1348 (5th Cir. 1979).

C.

Although prospective orders must be obeyed, federal courts are also empowered to alter mandatory orders when equity so requires. *United States v. United Shoe Machinery Corp.*, 391 U.S. 244 (1968); *System Federation No. 91, Railway Employee's Department v. Wright*, 364 U.S. 642 (1961); *United States v. Swift & Co.*, 286 U.S. 106 (1932). We have previously adopted the rationale behind these cases in establishing guidelines "applicable in all instances where . . . the relief sought is escape from the impact of an injunction." *Securities and Exchange Commission v. Jan-dal Oil & Gas, Inc.*, 433 F.2d 304, 305 (10th Cir. 1970).

Given the mandatory nature and prospective effect of an injunctive order, changes in injunctions must not be lightly countenanced but must be based upon a "substantial change in law or facts." *Securities and Exchange Commission v. Thermodynamics, Inc.*, 464 F.2d 457, 460 (10th Cir. 1972), *cert. denied*, 410 U.S. 927 (1973). A change in attitude by the party subjected to the decree is not enough of a change in circumstances to warrant withdrawing the injunction. *Id.* Therefore, when a party establishes that another has disregarded a mandatory decree or has taken action which has resulted in a deprivation of the benefits of injunctive relief, the court cannot lightly treat the claim. Having once determined the necessity to impose a remedy, the court should not allow any modification of that remedy unless the law or the underlying facts have so changed that the dangers prevented by the injunction "have become attenuated to a shadow," *Jan-dal*, 433 F.2d at 305, and the changed circumstances have produced " 'hardship so extreme and unexpected' as to make the decree oppressive." *Safeway*, 611 F.2d at 800 (quoting *Swift & Co.*). *See also United States v. United Shoe Machinery Corp.*, 391 U.S. at 251-52. Indeed, this "difficult and . . . severe requirement" is necessary to be consistent with res judicata principles. *Thermodynamics*, 464 F.2d at 460.

D.

The court's 1972 order requiring implementation of the Finger Plan was binding upon both sides. More pointedly, the order specified that the defendants were not to "alter or deviate from the [Finger Plan] . . . without the prior approval and permission of the court." *Dowell*, 338 F. Supp. at 1273. While defendants unilaterally could not take action contrary to the plan, plaintiffs also could not expect more than the approved plan provided. When, five years later, the court determined that the implementation of the Finger Plan had resulted in unitariness within the district, that finding became final, and it, too, is binding upon the parties with equal force. Yet, that historical finding does not preclude the plaintiffs from asserting that a continuing mandatory order is not being obeyed and that the consequences of the disobedience have destroyed the unitariness previously achieved by the district.

Thus, while the trial court properly refused to permit the plaintiffs to relitigate conditions extant in 1977, it erred in curtailing the presentation of evidence of changes that have since occurred. Consequently, plaintiffs were deprived of the opportunity to support their petition for enforcement of the court's prior order.

In reaching this conclusion, we are not traveling new trails. We contrast this case with the *Spangler* line of cases [5] in which an aggrieved party sought remedial relief in addition to the previous decree. Here, the plaintiffs do not seek the continuous intervention of the federal court decried by the Supreme Court. We are not faced with an attempt to achieve further desegregation based upon minor demographic changes not "chargeable" to the board.

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[5] *Spangler v. Pasadena City Board of Education*, 375 F. Supp. 1304 (C.D. Cal. 1974), *aff'd*, 519 F.2d 430 (9th Cir. 1975), *vacated*, 427 U.S. 424 (1976), *on remand*, 549 F.2d 733 (9th Cir. 1977).

Spangler, 427 U.S. at 435. Rather, here the allegation is that the defendants have intentionally abandoned a plan which achieved unitariness and substituted one which *appears* to have the same segregative effect as the attendance plan which generated the original lawsuit.

Given the sensitive nature of school desegregation litigation and the peculiar matrix in which such cases exist, we are cognizant that minor shifts in demographics or minor changes in other circumstances which are not the result of an intentional and racially motivated scheme to avoid the consequences of a mandatory injunction cannot be the basis of judicial action. *See Spangler*, 427 U.S. at 434-35; *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971). However, when it is asserted that a school board under the duty imposed by a mandatory order has adopted a new attendance plan that is significantly different from the plan approved by the court and when the results of the adoption of that new plan indictate a resurgence of segregation, the court is duty bound either to enforce its order or inquire whether a change of conditions consistent with the test posed in *Jan-dal* has occurred.

Therefore, consistent with traditional concepts of injunctive remedies in federal courts, plaintiffs have the right to a full determination of whether and to what extent their previously decreed rights have been jeopardized by the defendants' actions subsequent to the entry of the mandatory decree. Moreover, we hold the plaintiffs' assertion that the defendants abandoned the Finger Plan without court approval constitutes the "special circumstances" the trial court found absent from the case. The existence of these circumstances should have been recognized by the trial court as a basis for relief under Fed. R. Civ. P. 60(b), and the court's failure to do so results in manifest abuse of discretion which requires reversal. *See Security Mutual Casualty Co. v. Century Casualty Co.*, 621 F.2d 1062 (10th Cir. 1980).

III.

Having concluded the district court erred in not granting plaintiffs' motion to reopen, we must decide whether the error is significant in light of the court's factual findings on the board's new plan. After review of the evidence, which led the district court to hold the new plan was not constitutionally infirm, we conclude that reversal will not be futile.

The record indicates that the hearing from which the court's findings were drawn was called for a narrow purpose. The order setting the hearing provided:

> [T]he motion to intervene and reopen and the defendants' response join the issues, and the matters in them are set for evidentiary hearing . . . at which time *the question of whether the case shall be reopened and the applicants allowed to intervene shall be tried and disposed of.*

(Emphasis added.) From the outset, then, the only issues the parties were notified to present to the court dealt with reopening and intervention. The court did not indicate that it intended to hear evidence upon or determine the substantive constitutional issues relating to the plan or its effects.

Plaintiffs now argue they were unprepared to be heard on the ultimate issues. Indeed, on two occasions plaintiffs' counsel inquired whether the only issue to be heard was that of reopening, and the court replied affirmatively. Hence, plaintiffs argue their understanding of the limited scope of the hearing curtailed their cross-examination of the defendants' witnesses and prevented them from introducing evidence of alternative plans. Our review of the record supports this assertion. While evidence bearing on the substantive issue was presented, it focused on the underlying reasons for reopening the case rather than on the ultimate constitutional issue.

In reaching the substantive issues, the district court also improperly recast the burden of proof. As we have already noted, the plaintiffs, as the beneficiaries of the original injunction, only have the burden of showing the court's mandatory order has been violated. *Northside Realty Associates, Inc. v. United States*, 605 F.2d 1348 (5th Cir. 1979). The defendants, who essentially claim that the injunction should be amended to accommodate neighborhood elementary schools, must present evidence that changed conditions require modification or that the facts or law no longer require the enforcement of the order. *See E.E.O.C. v. Safeway Stores, Inc.*, 611 F.2d 795 (10th Cir. 1979), *cert. denied*, 446 U.S. 952 (1980).

Thus, by placing the burden on the plaintiffs to show the school district was no longer unitary, the court changed the usual course of what in reality is a petition for a contempt citation. The plaintiffs were required not only to prove the mandatory injunction had been violated, but also that the violation contravened the constitution. In the framework of *this* case, the latter element was beyond the scope of the hearing and certainly never the plaintiffs' burden.

Accordingly, we believe the trial court reached the merits prematurely. We applaud the court's effort to bring speedy resolution to a difficult issue, but fairness and our understanding of the procedures governing federal injunctive remedies require us to conclude the court did not give the moving parties ample opportunity to develop substantive issues.

We have confined our analysis to the narrow issue of the plaintiffs' right to reopen; therefore, our holding should not be construed as addressing, even implicitly, the ultimate issue of the constitutionality of the defendants' new school attendance plan. The judgment of the trial court is reversed and the case is remanded for further proceedings to determine whether the original mandatory order will be enforced or whether and to what extent it should be modified.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

No. CIV-9452

ROBERT L. DOWELL, *et al.*,
Plaintiffs,

vs.

BOARD OF EDUCATION OF THE
OKLAHOMA CITY PUBLIC SCHOOLS, *et al.*,
Defendants.

Applicants for Intervention: YVONNE MONET ELLIOT and DONNOIL S. ELLIOT, both minor children, by and through their parent and guardian, DONALD R. ELLIOT; DIALLO K. MCCLARTY, a minor child, by and through his parent and guardian, DONNA R. MCCLARTY; DONNA CHAFFIN and FLOYD EDMUN, both minor children, by and through their parent and guardian, GLENDA EDMUN; CHELLE LUPER WILSON, a minor child, by and through her parent and guardian, CLARA LUPER; DONNA R. JOHNSON, SHARON R. JOHNSON, KEVIN R. JOHNSON, and JERRY D. JOHNSON, all minor children, by and through their parent and guardian, BETTY R. WALKER; LEE MAUR B. EDWARDS, a minor child, by and through his parent and guardian, ELROSA EDWARDS; NINA HAMILTON, a minor child, by and through her parent and guardian, LEONARD HAMILTON; JAMIE DAVIS, a minor child, by and through his parent and guardian, ETTA T. DAVIS; and ROMAND ROACH, a minor child, by and through his parent and guardian, CORNELIA ROACH.

[Filed April 25, 1985]

ORDER

In accordance with the findings of fact and conclusions of law entered herein this day,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the Motion to Reopen Case, to Intervene and For Further Relief filed by the applicants for intervention is denied.

Dated this 25th day of April, 1985.

/s/ Luther Bohanon
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

No. CIV-9452

ROBERT L. DOWELL, *et al.*,
Plaintiffs,

vs.

BOARD OF EDUCATION OF THE
OKLAHOMA CITY PUBLIC SCHOOLS, *et al.*,
Defendants.

Applicants for Intervention: YVONNE MONET ELLIOT and DONNOIL S. ELLIOT, both minor children, by and through their parent and guardian, DONALD R. ELLIOT; DIALLO K. MCCLARTY, a minor child, by and through his parent and guardian, DONNA R. MCCLARTY; DONNA CHAFFIN and FLOYD EDMUN, both minor children, by and through their parent and guardian, GLENDA EDMUN; CHELLE LUPER WILSON, a minor child, by and through her parent and guardian, CLARA LUPER; DONNA R. JOHNSON, SHARON R. JOHNSON, KEVIN R. JOHNSON, and JERRY D. JOHNSON, all minor children, by and through their parent and guardian, BETTY R. WALKER; LEE MAUR B. EDWARDS, a minor child, by and through his parent and guardian, ELROSA EDWARDS; NINA HAMILTON, a minor child, by and through her parent and guardian, LEONARD HAMILTON; JAMIE DAVIS, a minor child, by and through his parent and guardian, ETTA T. DAVIS; and ROMAND ROACH, a minor child, by and through his parent and guardian, CORNELIA ROACH.

[Filed April 25, 1985]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

On February 19, 1985, the petitioners filed a Motion to Reopen this desegregation case to challenge the constitutional validity of a recently proposed Student Reassignment Plan which curtails cross-town busing in Oklahoma City of elementary school chidren in grades one through four. In their motion, petitioners allege that the Oklahoma City School District has not achieved unitary status, and that the School Board's proposed plan creates racially identifiable neighborhood schools thereby resegregating the Oklahoma City School District.

On March 6, 1985, the defendant School Board filed a Response to Petitioners' Motion alleging the school district became unitary in 1977 and that the proposed plan was justified and constitutional.

On March 13, 1985, the court entered an Order finding that petitioners' Motion and defendants' Response joined the issues, and set the Motion to Reopen down for an evidentiary hearing. The hearing was conducted on April 15 and 16, 1985. At the hearing the petitioners were represented by John W. Walker of Little Rock, Arkansas, Ted A. Shaw of New York City, New York, Lewis Barber, Jr., for Oklahoma City, Oklahoma, and Jethro Curry of Oklahoma City. The defendant Board of Education was represented by Ronald L. Day of Oklahoma City.

Case History

This action was originally commenced in October, 1961, as a class action seeking equitable relief against the Oklahoma City Board of Education for operating a state-compelled dual system of education. In July, 1963, this court handed down its decision finding that the Oklahoma City School Board's refusal to grant a transfer to a black student from a predominantly black school to a predominantly white school constituted unlawful race discrimination. *Dowell v. School Board of the Oklahoma*

City Public Schools, 219 F.Supp. 427 (1963). During the years that followed, this case again came before this court and appellate courts on issues relating to the Oklahoma City School Board's obligation to convert a state-compelled dual school system into a unitary system which would eliminate racial discrimination.

In February, 1972, after conducting many hearings, this court ordered the Oklahoma City School Board to implement what came to be known as the "Finger Plan." *Dowell v. Board of Education of the Oklahoma City Public Schools*, 338 F.Supp. 1256 (W.D. Okl. 1972). Under the Finger Plan, high school attendance zones (grades 9-12) were restructured so that each high school enrolled both black and white pupils. To accomplish this, an elementary school feeder system was used so that students were assigned to a high school based on the elementary school attendance zone in which their home was located. Similarly, middle schools (grades 6-8) were desegregated by the establishment of attendance zones for each school. At the elementary level all majority black schools were converted to fifth year centers, while all other schools were to serve grades 1-4. White students in the group attended their neighborhood school for grades 1-4, and attended the formerly black schools for the fifth grade. Black students formerly assigned to the schools now used as fifth year centers were split up and attended the majority white schools for grades 1-4. Black students in fifth grade attended the fifth grade center which was previously their neighborhood school. Elementary schools located in naturally integrated neighborhoods qualified for an exception to the general plan known as "stand alone" status, a term to be explained further *infra*, and operated as schools enrolling grades kindergarten through fifth. Kindergartens existed at each elementary school and were permitted to continue without forced desegregation through busing. Parents of kindergarten children were given the freedom to choose the school their child

attended. The freedom of choice was justified because it permitted kindergarten children to go to the school in the vicinity of the place where their mother was working, or to walk to kindergarten with other siblings or neighborhood children. *Id.* at 1267-1268.

The court's decision in February, 1972, implementing the Finger Plan was upheld on appeal. *Dowell v. Board of Education of the Oklahoma City Public Schools*, 465 F.2d 1012 (10th Cir. 1972), *cert. denied*, 409 U.S. 1041 (1972).

The Oklahoma City Board of Education implemented and properly operated the Finger Plan for several years. After the Finger Plan had been in operation for some time, the Board of Education filed a "Motion to Close Case" on the grounds that it "[had] eliminated all vestiges of state-imposed racial discrimination in its school system and [was] . . . operating a unitary school system." Thereafter, the court conducted a hearing to receive evidence from plaintiffs and defendants concerning the state of desegregation in the Oklahoma City public schools, and on January 18, 1977, entered an order relinquishing its jurisdiction and terminating this case. The "Order Terminating Case" states in pertinent part as follows:

> . . . [T]he School Board, under the oversight of the Court, has operated the Plan properly, and the Court does not foresee that the termination of its jurisdiction will result in the dismantlement of the Plan or any affirmative action by the defendant to undermine the *unitary system* so slowly and painfully *accomplished* over the 16 years during which the cause has been pending before the Court."
>
> . . .
>
> Now sensitized to the constitutional implications of its conduct and with a new awareness of its responsibility to citizens of all races, the Board is en-

titled to pursue in good faith its legitimate policies without the continuing constitutional supervision of this Court. . . .

ACCORDINGLY, IT IS ORDERED:

1. The *Biracial Committee* established by the Court's Order of December 3, 1971, which has been an effective and valued agency of the Court in the implementation of the Plan, is hereby dissolved;

2. *Jurisdiction* in this case is *terminated* ipso facto subject only to final disposition of any case now pending on appeal. (emphasis added)

Plaintiffs did not appeal the Order Terminating Case. To this date the Oklahoma City Board of Education continues to implement the substance of the Finger Plan with minor modifications. There has been no attempt to revive or reopen this case during the eight years which passed from the time this court terminated its jurisdiction until the present contest.

Findings of Fact

1. One of the many elements of the Finger Plan carried forward by the Oklahoma City Board of Education was the provision for kindergarten through fifth grade (K-5) "stand alone" schools. That is, when racial balance in a neighborhood is achieved through natural integration the elementary school qualifies as a K-5 "stand alone" school. When this status is achieved, the fifth grade is returned to the elementary school, and children are no longer bused into or out of the elementary school to achieve racial balance.

2. As the years passed by, more and more neighborhoods in Oklahoma City became naturally integrated. By mid-1984, more than twelve years after the Finger Plan had been in operation, more than a dozen elementary

schools were located in neighborhoods with a racial balance that qualified them for "stand alone" school status.

3. In 1984 the Board of Education recognized Bodine Elementary School in southeast Oklahoma City as a K-5 "stand alone" school. In the process, the School Board noticed certain inequities (hereinafter identified) starting to surface with the advent of more and more schools qualifying for K-5 "stand alone" status.

4. On July 16, 1984, the Board of Education appointed a committee to study the school district's K-5 schools, and to report back to the Board with positive recommendations. The committee consisted of three School Board members. Dr. Clyde Muse, who is black and has a Ph.D. in education, chaired the committee. Also on the committee were Mrs. Susan Hermes and Mrs. Betty Hill. Both of these School Board members had prior experience as certified school teachers. The committee frequently called upon the school district's research department for data and statistics needed during the study. During the time the committee was meeting, Dr. Muse traveled to the Office of Civil Rights in Dallas, Texas, for consultation and advice.

5. On November 19, 1984, the committee presented a report to the entire Board concerning its study on the far-reaching effects of an increased number of K-5 "stand alone" schools, and recommended that the Board adopt a new Student Reassignment Plan which, among other things, eliminated K-5 "stand alone" schools.

6. The committee study revealed that as more neighborhoods became naturally integrated and their schools qualify for K-5 "stand alone" status, the young black students previously bused into those schools would have to be reassigned to other schools. Since most of the naturally integrated schools are centrally located in the City, the reassignment of young blacks would be to schools located further north, west or south. The effect would be

to increase the busing burden in terms of time and distance on young black children in the first through fourth grades. Further, the committee pointed out that when a "stand alone" school reacquires its fifth grade, this causes the student population at the fifth year centers located in the northeast quadrant of the district to drop, and the centers to be subjected to closing.

7. Also, the committee was concerned with the decline of parental involvement in the schools, and wanted a plan which would have the effect of increasing parental involvement. Curriculum uniformity was also a consideration of the committee. All fifth year centers have enrichment programs including intramurals, string instruments, the Opening Doors program and special interest sessions. The committee felt it would be increasingly difficult to make these fifth year center programs equally available within the new K-5 "stand alone" schools.

8. After the committee made its report and submitted its recommendation, public hearings were conducted at various schools throughout the community to discuss the proposed plan. Thereafter, a special School Board meeting was conducted on December 10, 1984, so that anyone in the community could state their views and make suggestions about the proposed plan directly to the Board of Education. The Superintendent of Schools sent copies of the proposed plan to the Office of Civil Rights, and invited personnel from the Office of Civil Rights to attend the public hearings where the proposed plan was being discussed.

9. As a result of positive input from the public, the committee recommended that certain specific amendments not affecting the overall character of the plan be made. Thereafter, on December 17, 1984, the Oklahoma City Board of Education unanimously adopted the Student Reassignment Plan which is to go into effect at the commencement of the 1985-86 school year.

10. The fundamental elements of the plan, admitted into evidence as plaintiffs' Exhibit # 1 and incorporated by reference in these findings of fact, are as follows:

(a) The Plan calls for K-4 neighborhood schools throughout the district. This eliminates compulsory busing of young black children, grades 1-4, to elementary schools outside their immediate neighborhood;

(b) An equity officer is to monitor all schools to insure the equality of facilities, equipment, supplies, books and instructors in all schools. An equity committee is to assist the equity officer and recommend ways to integrate students at any racially identifiable elementary schools several times each year;

(c) A "majority to minority" transfer policy will allow elementary students assigned to a school where their race is in the majority to obtain a transfer to a school in which their race will be in the minority. The transfer option is encouraged through district-provided transportation;

(d) All faculties and staff will remain integrated at all schools in the district; and

(e) Fifth year centers will be located in all sections of the school district. All fifth year centers, middle schools, and high schools in the school district will continue to be racially balanced with the aid of busing.

11. Population changes have occurred in the Oklahoma City School District from the time the Finger Plan was implemented. In 1970, 325,000 people lived in the school district. In 1980, 305,000 people lived in the school district. In 1971, 68,840 students attended school in the district. In 1985, 40,375 students attend school in the district. In 1971, the student population was 23.4% black. In 1985, the student population is 38.3% black.

In 1971, the student population was 76.6% white. In 1985, the student population is 49.6% white. (The failure of the 1985 figures to add up to 100% is due to the exclusion of non-black minorities from the figures used to calculate percentage of whites and blacks. This apparently was not done with the figures presented to the court in 1971.)

12. Presently, the racial composition of the faculty and staff serving Oklahoma City Public Schools is as follows:

Teachers	30.4% black
Principals	28.4% black
Other Administrators	35.5% black
Coaches	45.6% black
Counselors	41.3% black
Special Ed. Teachers	30.2% black
Support Personnel	45.9% black

Also, the Oklahoma City Board of Education has in the past and continues to implement and follow an affirmative action plan. At present, racial balance within 15 percentage points of the proportions in the system-wide student population is maintained in all classes in grades 1-12 through busing.

13. Under the Student Reassignment Plan there will be 64 elementary schools. Eleven of those schools will be ninety percent (90%) or more black. Twenty-two of the 64 elementary schools will be ninety percent (90%) or more white and non-black minorities. The remaining 31 elementary schools will be racially mixed between blacks and non-blacks. The Oklahoma City Board of Education has neither altered the boundaries to these elementary schools so as to create a certain number of racially identifiable schools, nor attempted to fix or alter demographic patterns to affect the racial composition of its schools.

14. Under the Student Reassignment Plan the curriculum in all the elementary schools will be the same. The special education programs offered in all schools will be the same. The student-teacher ratio in all schools remain the same. Facilities, equipment, supplies and textbooks will be equal. As was pointed out previously, the faculties and staffs at each elementary school will remain integrated.

15. In the early 1970's, there were approximately 94 parent-teacher associations within the school district with a total membership in exces of 25,000 people. Presently, there are only 14 parent-teacher associations and the membership is less than 5,000. Parental involvement is an essential ingredient to a quality education. The Board of Education previously took steps in an effort to increase parental involvement. An attempt was made to implement a district-wide parents council. School Board meetings were moved out into the community. Buses were sent to certain schools to pick up parents for meetings. However, these efforts failed. The court finds that the degree of parental involvement in the schools is a legitimate concern of the Board of Education, and that the School Board's proposed plan will have the effect of increasing parental involvement at the elementary school level.

16. Student participation in extracurricular activities is also an essential ingredient to a quality education. The School Board's proposed plan will give elementary students a greater opportunity to participate in such activities.

17. The School Board has a genuine concern for maintaining schools in all areas that the school district serves. Also, the amount of time and distance traveled by elementary school children on buses is a genuine concern of the Board of Education.

18. The Board of Education adopted the Student Reassignment Plan for legitimate purposes: to protect

against the loss of schools in the northeast quadrant of the district; to maintain fifth year centers throughout the district; to reduce the busing burden on young black students; to increase parental and community involvement in the schools; and to improve programs and provide elementary children with a greater opportunity for participation in extracurricular activities.

19. The Student Reassignment Plan is not discriminatory, and it was not adopted by the Oklahoma City Board of Education with the intent to discriminate on the basis of race or with a deliberate purpose to affect the racial composition of the schools. Any change in the racial composition of the schools that may be expected to result from the plan is an unintended and largely unavoidable consequence of other objectives sought for the benefit of all students. The court is convinced that the Board of Education is equally concerned about the health, education and well-being of both black students and white students.

20. The School Board members on the committee who recommended the Student Reassignment Plan were qualified by virtue of their educational background and experience to conduct the study and formulate the various components of the Student Reassignment Plan. The Student Ressignment Plan is educationally sound, and when implemented, will accomplish the objectives of the Board of Education.

Conclusions of Law

1. The Supreme Court in *Green v. New Kent County School Board*, 391 U.S. 430, 437-38 (1968), held that once it is determined that a school district is operating a dual system, then the school authorities are "clearly charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch." In *Green*, the Court identified six components of a school system which must be desegregated before

the entire system can achieve unitary status: faculty, staff, transportation, extracurricular activities, facilities, and composition of the student body. *Id.* at 435.

2. The specific question of when a district court should declare a school system "unitary" and terminate its remedial jurisdiction has been addressed by the Supreme Court and the Tenth Circuit Court of Appeals. The Supreme Court in *Raney v. Board of Education*, 391 U.S. 443, 449 (1968) held that "in light of the complexities inhering in the disestablishment of state-established segregated school systems, *Brown II* contemplated that the better course would be to retain jurisdiction until it is clear that disestablishment has been achieved." Similarly, in an earlier decision in this very case, the Tenth Circuit Court of Appeals stated that "jurisdiction should be held until such time as the court is satisfied that the decreed unconstitutional practices are eliminated and appellant board is found to be in full compliance with the teachings of the *Brown* case." *Board of Education of Oklahoma City Public Schools v. Dowell*, 375 F.2d 158, 168 (10th Cir. 1967).

3. This court in its 1972 order directing the implementation of the Finger Plan recognized that the court "was required to retain jurisdiction to evaluate the Plan in practice and to see that state imposed segregation was completely removed." *Dowell v. Board of Education of the Oklahoma City Public Schools*, 338 F.Supp. 1256, 1258, footnote 1 (W.D. Okl. 1972).

4. At the time this court totally relinquished its jurisdiction over this case in 1977, the court was convinced that the Finger Plan had been carried out in a constitutionally permissible fashion and that the School District had reached the goal of being a desegregated non-racially operated and unitary school system. In the Order Terminating Case this court specifically found that the School Board had complied with the requisite constitutional requirements and recognized that a "unitary system" had

been "accomplished" over the previous sixteen years. The Order Terminating Case was not appealed, and no attempt to revive or reopen this litigation was made during the eight years which passed from the time the Order was entered in 1977 until the Motion to Reopen was filed in 1985.

5. The Supreme Court has approved the view that the fact that a case is in the nature of a suit in equity, authorized by 42 U.S.C. § 1983, as is this one, "presents no categorical bar to the application of res judicata and collateral estoppel concepts." *Allen v. McCurry*, 449 U.S. 90, 97 (1980). These concepts were explained by the Court as follows:

> Under res judicata, a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action. *Cromwell v. County of Sac*, 94 U.S. 351, 352. Under collateral estoppel, once a court has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of the issue in a suit on a different cause of action involving a party to the first case. *Montana v. United States*, 440 U.S. 147, 153. As this Court and other courts have often recognized, res judicata and collateral estoppel relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources, and, by preventing inconsistent decisions, encourage reliance on adjudication. *Id.*, at 153-154.

Id. at 94. In the present case, this court's finding in 1977 that a unitary system had been achieved by the Oklahoma City public schools is res judicata as to those who were then parties to this action. At the time of that Order, the plaintiffs in this action represented the entire class of school-aged black children within the Oklahoma City Public School District, and the present petitioners acknowledge that this class included *future* black children.

At the very least, the present applicants for intervention, appearing through their parents and guardians, seek to represent a similarly-defined class of black children and are themselves members of said class. Though the individual members of this class have changed with the passage of time, this change cannot defeat the preclusive effect of this court's original finding of unitariness. Courts have held that even when a first case was a so-called "spurious" class action "a public body should not be required to defend repeatedly against the *same* charge of improper conduct if it has been vindicated in an action brought by a person or group who validly and fairly represent those whose rights are alleged to have been infringed." *Bronson v. Board of Education*, 525 F.2d 344, 349 (6th Cir. 1975), *cert. denied*, 425 U.S. 934 (1976) (emphasis in original). There has been no showing in this case that the original plaintiffs did not validly and fairly represent all those whose rights are concerned here. The present petitioners are, therefore, collaterally estopped from relitigating the issue of the unitary character of the Oklahoma City Public Schools as of 1977 even if res judicata itself is not strictly applicable to the facts of this attempted class intervention. *Id.*; *see Bell v. Board of Education*, 683 F.2d 963 (6th Cir. 1982); *L. A. Unified School District v. L.A. Branch NAACP*, 714 F.2d 935 (9th Cir. 1983) (*Bronson* cited with approval, but res judicata found to be the more applicable doctrine under the circumstances of the case).

6. Furthermore, this court finds that the Oklahoma City School District displays today, as it did in 1977, all indicia of "unitariness." It has now been thirteen years since cross-town busing was introduced and almost twenty-five years since the start of desegregation litigation in Oklahoma City. The evidence in this case demonstrates that the Oklahoma City School District remains unitary today. The School Board, administration, faculty, support staff, and student body are integrated. Further,

transportation, extracurricular activities and facilities within the school district are equal and non-discriminatory. This court's finding of unitariness in 1977 was fully justified, and remains a finding which is today fully justified.

7. Supreme Court precedent is clear that once a school system has become unitary, the task of a supervising federal court is concluded. "Neither school authorities nor district courts are constitutionally required to make year-by-year adjustments of the racial composition of student bodies once the affirmative duty to desegregate has been accomplished and racial discrimination through official action is eliminated from the system." *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 31-32 (1971). Where unitary status has been achieved, district court intervention is normally not necessary unless there is a showing that the school district "has deliberately attempted to fix or alter demographic patterns to affect the racial composition of the schools." *Id.* at 32. "[H]aving once implemented a racially neutral attendance pattern in order to remedy the perceived constitutional violations on the part of the defendants, [a District Court has] fully performed its function of providing the appropriate remedy for previous racially discriminatory attendance patterns." *Pasadena City Bd. of Education v. Spangler*, 427 U.S. 424, 436-37 (1976).

8. The Tenth Circuit Court of Appeals has recognized "that neighborhood school attendance policies, when impartially maintained and administered, do not violate any fundamental Constitutional principle or deprive certain classes of individuals of their Constitutional rights." *Board of Education of Oklahoma City Public Schools v. Dowell*, 375 F.2d 158, 166 (10th Cir. 1967), *cert. denied* 87 S.Ct. 2054 (1967).

9. Also, the Supreme Court has recognized that in a system that has not been deliberately constructed and maintained to enforce racial segregation, "it might well

be desirable to assign pupils to schools nearest their homes." *Swann*, 402 U.S. at 28.

10. Congres has also passed legislation recognizing the desirability of neighborhood schools. 20 U.S.C. § 1701 states:

> (a) The Congress declares it to be the policy of the United States that—
>
> (1) all children enrolled in public schools are entitled to equal educational opportunity without regard to race, color, sex or national origin; and
>
> (2) the neighborhood is the appropriate basis for determining public school assignments.

The fact that the Student Reassignment Plan adopted by the Oklahoma City Board of Education calls for neighborhood schools in grades K-4 does not offend the Constitution.

11. In *Swann*, the Supreme Court noted that, "the constitutional command to desegregate schools does not mean that every school in every community must always reflect the racial composition of the school system as a whole." 402 U.S. 24. Furthermore, the existence of some one-race schools within a district "is not in and of itself the mark of a system that still practices segregation by law." *Id.* at 26.

12. The existence of racially identifiable schools is not unconstitutional without a showing that such schools were created for the purpose of discriminating on the basis of race. *Keyes v. School District No. 1*, 413 U.S. 189 (1973). The presence of discriminatory intent may not be inferred solely from the disproportionate impact of a particular measure upon one race. The Supreme Court has clearly stated that "official action will not be held unconstitutional solely because it results in a racially disproportionate impact." *Arlington Heights v.*

Metropolitan Housing Corp., 429 U.S. 252, 264-65 (1977); *Washington v. Davis*, 426 U.S. 229 (1976). The Student Reassignment Plan was not created for the purpose of discriminating on the basis of race.

13. The Supreme Court has recognized the optional majority-to-minority transfer provision as a useful part of a desegregation plan. *Swann*, 402 U.S. at 26-27.

14. The Supreme Court has also acknowledged that:

> An objection to transportation of students may have validity when the time or distance of travel is so great as to either risk the health of the children or significantly impinge on the educational process . . . [L]imits on time of travel will vary with many factors, but probably with none more than the age of the students involved.

Swann, 402 U.S. at 30-31.

15. The decision whether a case should be reopened under Federal Rule 60(b)(6) is discretionary. Special circumstances must be shown in order to justify relief under this rule. *Stewart Securities Corp v. Guarantee Trust Co.*, 71 F.R.D. 32 (W.D. Okl. 1976). The Student Reassignment Plan of the Oklahoma City Board of Education is constitutional, and special circumstances are not present which would justify reopening this litigation.

An appropriate order will accordingly be entered herein.

Dated this 25th day of April, 1985.

/s/ Luther Bohanon
United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

No. CIV-9452

ROBERT L. DOWELL, ETC., *et al.*,
Plaintiffs,

VS.

BOARD OF EDUCATION OF THE
OKLAHOMA CITY PUBLIC SCHOOLS, ETC., *et al.*,
Defendants.

[Filed Jan. 18, 1977]

ORDER TERMINATING CASE

There is now pending before the Court a Motion by the defendant to close the case. A hearing has been conducted by the Court to receive the evidence of both plaintiff and defendant concerning the state of desegregation in the Oklahoma City Public Schools.

The Court has carefully reviewed this evidence and all of the reports it has received from the defendant and the Biracial Committee since the inception February 1, 1972, of "A New Plan of Unification for the Oklahoma City Public School System," commonly known as the Finger Plan. The Court has concluded that this was indeed a Plan that worked and that substantial compliance with the constitutional requirements has been achieved. The School Board, under the oversight of the Court, has operated the Plan properly, and the Court does not foresee that the termination of its jurisdiction will result

in the dismantlement of the Plan or any affirmative action by the defendant to undermine the unitary system so slowly and painfully accomplished over the 16 years during which the cause has been pending before the Court.

Constitutional principles so bitterly contested by former members of the Board have now become a part of the fabric of the present school administration. The only standard ever imposed by the Court has been obedience to the Constitution. The School Board, as now constituted, has manifested the desire and intent to follow the law. The Court believes that the present members and their successors on the Board will now and in the future continue to follow the constitutional desegregation requirements.

Now sensitized to the constitutional implications of its conduct and with a new awareness of its responsibility to citizens of all races, the Board is entitled to pursue in good faith its legitimate policies without the continuing constitutional supervision of this Court. The Court believes and trusts that never again will the Board become the instrument and defender of racial discrimination so corrosive of the human spirit and so plainly forbidden by the Constitution.

ACCORDINGLY, IT IS ORDERED:

1. The Biracial Committee established by the Court's Order of December 3, 1971, which has been an effective and valued agency of the Court in the implementation of the Plan, is hereby dissolved;

2. Jurisdiction in this case is terminated ipso facto subject only to final disposition of any case now pending on appeal.

Dated this 18th day of January, 1977.

/s/ Luther Bohanon
United States District Judge

Supreme Court, U.S.
FILED
SEP 23 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-326

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

THE BOARD OF EDUCATION OF THE OKLAHOMA CITY PUBLIC SCHOOLS, INDEPENDENT DISTRICT NO. 89, OKLAHOMA COUNTY, OKLAHOMA, a Public Body Corporate,

Petitioner,

v.

ROBERT L. DOWELL, *et al.*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF IN OPPOSITION TO CERTIORARI

JULIUS L. CHAMBERS*
JAMES M. NABRIT, III
NAPOLEON B. WILLIAMS, JR.
THEODORE M. SHAW
NORMAN J. CHACHKIN
99 Hudson Street
16th Floor
New York, New York 10013
(212) 219-1900

*Counsel of Record

LEWIS BARBER, JR.
Barber/Traviolia
1528 N.E. 23rd Street
Oklahoma City, Oklahoma 73111
(405) 424-5201

JOHN W. WALKER
1723 Broadway
Little Rock, Arkansas 72206
(501) 374-3758

Attorneys for Respondents

Counter-Statement of Question Presented

In the circumstances of this case, the questions sought to be raised by petitioner simply do not arise on this record. The judgment below is not based upon resolution of those questions. Rather, the only issue which this Court could appropriately decide were it to grant review at this stage of the proceedings is:

> Should members of a class on whose behalf a mandatory injunction has been issued be permitted to reopen the litigation to seek enforcement of their rights upon a showing "that the defendants abandoned [compliance with the decree] without court approval" (Pet. App. 13a)?

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In the
SUPREME COURT OF THE UNITED STATES
October Term, 1986

No. 86-326

THE BOARD OF EDUCATION OF THE OKLAHOMA CITY PUBLIC SCHOOLS, INDEPENDENT DISTRICT NO. 89, OKLAHOMA COUNTY, OKLAHOMA, a Public Body Corporate,

Petitioner,

v.

ROBERT L. DOWELL, et al.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

---

BRIEF IN OPPOSITION TO CERTIORARI

Statement

Respondents are members of the class of black school children on whose behalf this school desegregation lawsuit was originally commenced. They sought to intervene and to reopen the litigation, in order to obtain enforcement of the mandatory injunction which the original plaintiffs had secured for their benefit. The

injunction had never been vacated or withdrawn even though the federal district court had relinquished active supervisory jurisdiction of the lawsuit.

The district court set the matter down for a hearing "at which time the question of whether this case shall be reopened and the applicants allowed to intervene shall be tried and disposed of." At the conclusion of the hearing the court not only denied the motion to reopen but purported to rule on the underlying substantive question whether the injunction should remain in effect.

The Court of Appeals held that respondents should have been permitted to reopen the case and that the trial court's ruling on the merits was premature, since respondents had no adequate notice of the scope of the hearing and were consequently denied the opportunity to present all relevant proof. Accordingly, the Court of Appeals

remanded for further evidentiary proceedings while emphasizing that it was not "addressing, even implicitly, the ultimate issue . . . ." (Pet. App. 15a.)

History of Litigation

From the time of Oklahoma's admission to the Union in 1907 until well after Brown v. Board of Education, 349 U.S. 294 (1955), the public schools of Oklahoma City were operated on the basis of complete and mandatory racial segregation as directed by the state's constitution and laws. Dowell,[1] 219 F. Supp. 427, 431-34 (W.D. Okla. 1963). This lawsuit was initiated in 1961 because the dual system of education remained in place at that time. Following an evidentiary hearing, the district court in 1963 found that residential patterns in Oklahoma City were highly segregated by

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[1]Citations to earlier reported opinions in this action are identified simply as "Dowell."

race because of state law,[2] enforcement of restrictive covenants,[3] and the long standing practice of school segregation.[4] Accordingly, the court found, when the school board in 1955 drew geographic (non-overlapping) zone lines for each school, the traditionally black schools "remained virtually 100% Negro."[5]

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[2]Dowell, 244 F. Supp. 971, 975 (W.D. Okla. 1965); cf. Buchanan v. Warley, 245 U.S. 60 (1917); City of Richmond v. Deans, 281 U.S. 704 (1930).

[3]Dowell, 219 F. Supp. at 433, 244 F. Supp. at 975; cf. Shelley v. Kraemer, 334 U.S. 1 (1948).

[4]Dowell, 219 F. Supp. at 433-34; 244 F. Supp. at 975, 976. See, e.g., Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 20-21 (1971)(influence of school segregation policies upon residential segregation); Tr. 88-89 (same [testimony of school board member Dr. Clyde Muse])

[5]Dowell, 244 F. Supp. at 975. The board also established a minority-to-majority transfer policy which operated to maintain segregation. Id. at 434-35, 440-41, 244 F. Supp. at 997; see Goss v. Board of Educ. of Knoxville, 373 U.S. 683 (1963).

In 1963 the district court directed the school board to prepare and submit "a complete and comprehensive plan for the integration of the Oklahoma City school system," Dowell, 219 F. Supp. at 447-48. It took nearly a decade of further litigation before such a plan was prepared and implemented.[6] When that occurred, in 1972,

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[6]The school board's initial submission "professe[d] adherence to a neighborhood school policy based on 'logically consistent geographical areas,'" 244 F. Supp. at 976, which the district court found to "lea[d] inexorably to continued school segregation" because of the officially induced segregated residential patterns of Oklahoma City. Id.

The trial court repeatedly allowed the school board additional time to submit an effective desegregation plan. See Dowell, 244 F. Supp. 971 (W.D. Okla. 1965), modified and aff'd, 375 F.2d 158 (10th Cir.), cert. denied, 387 U.S. 931 (1967); 396 U.S. 269 (1969)(reversing delay in implementing interim secondary plan); 307 F. Supp. 583 (W.D. Okla. 1970), aff'd, 430 F.2d 865 (10th Cir. 1970)(approving secondary plan). In 1972, finding that the school board had failed to carry out its secondary plan and refused to submit an effective plan for its elementary schools, the district court ordered the im-

the school board and "its members, agents, servants, employees, present and future," were specifically enjoined to "implement and place into effect [a plan] which embodies the principles and suggestions contained in the Plaintiffs' Plan," and they were also prohibited from "alter[ing] or deviat[ing] from the New Plan without the prior approval and permission of the court." Dowell, 338 F. Supp. at 1273 para.

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plementation of a plan drafted by the plaintiffs' expert witness, Dr. John A. Finger, see Swann, 402 U.S. at 8-9. Dowell, 338 F. Supp. 1256 (W.D. Okla.), aff'd, 465 F.2d 1012 (10th Cir.), cert. denied, 409 U.S. 1041 (1972).

The "Finger Plan" retained the board's post-Brown attendance zones for elementary schools but clustered each traditionally black school with a group of predominantly white schools, restructuring the grades to achieve integration. (Tr. 263, 275). Elementary zones were somewhat similarly grouped into feeder patterns for the various junior high and high schools to desegregate them. Dowell, 338 F. Supp. at 1267-68.

2,3,5.[7] That injunction has never been vacated.

Termination of Jurisdiction

Over the next five years the litigation continued to be quite active. The docket entries reflect that during this period of time, the district court approved seven board-proposed modifications of the plan and denied three requests.[8]

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[7]The district court's order recited that "[i]t is not intended that the school authorities be placed in a 'strait jacket' in the administration of the plan, but it is essential that the court be informed of any proposed departure from the sanctioned program." 338 F. Supp. at 1273 para. 3.

[8]Most of the changes involved alteration of feeder patterns or closure of schools; school attendance areas have remained basically the same up to the present time (Tr. 336 [testimony of school board president]). The trial judge also required the board to reassign principals in order to mitigate the racial identifiability of the two high schools enrolling the highest proportions of black students, Dowell, No. CIV-9452 (W.D. Okla. June 3, 1974), aff'd, No. 74-1415 (10th Cir. Jan. 28, 1975), cert. denied, 423 U.S. 824 (1975), and warned the

On January 18, 1977 the district court disposed of a June 2, 1975 "Motion to Close Case" filed by the school board.[9] It relinquished jurisdiction over the case because:

> the Court does not foresee that the termination of its jurisdiction will result in the dismantlement of the [Finger] Plan or any affirmative action by the defendant to undermine the unitary system so slowly and painfully accomplished over the 16 years during which this cause has been pending before the Court.[10]

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board in 1974 that he "w[ould] not look with favor upon further proposals casting disproportionate burdens on the black community."

[9]The court held a hearing on the motion on November 18, 1975.

[10]The court's order further stated:

> . . . The Court believes that the present members and their successors on the Board will now and in the future continue to follow the constitutional desegregation requirements.
>
> Now sensitized to the constitutional implications of its conduct

However, the January 18, 1977 order did not vacate the 1972 permanent injunction; consequently plaintiffs did not appeal.[11]

> and with a new awareness of its responsibility to citizens of all races, the Board is entitled to pursue in good faith its legitimate policies without the continuing constitutional supervision of this Court. . . .

(The entire Order of January 18, 1977 is reprinted at Pet. App. 35a-36a.)

The court also dissolved the bi-racial committee whose members it had appointed since 1972 and which had been the source of a number of modifications to the plan, including the reassignment of high school principals, see supra note 8

[11]The trial court had earlier dismissed the action sua sponte "to have a cooling period" so that "the schools were permitted to operate during the 1970-71 school year without the stress of litigation," see Dowell, 338 F. Supp. at 1258 n.1, but it vacated that dismissal some eight months later, id., fashioning further remedial orders when it learned that the school board had reneged on its commitment and obligation to implement the previously approved plan. See supra note 6.

Current Proceedings

As the court and the parties anticipated, the plan remained in effect after 1977. In 1984, purportedly concerned by the interrelationship between the "stand alone school" feature of the original Finger Plan[12] and a school board policy on school closings,[13] the board appointed a

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[12]The plan recommended that schools serving attendance zones (the same zones drawn by the board in 1955, see supra text at n.5 & note 8) which became residentially integrated should no longer participate in the system of grouping and grade restructuring but should serve all elementary students living in their zones.

[13]The school board has adopted minimum enrollment requirements for elementary schools to remain open. Since 1972, the attendance areas of about a dozen formerly white schools have become sufficiently mixed residentially so that the schools qualified for "stand alone" status, see supra note 12. As white students from these schools were removed, enrollment in the formerly all-black schools (which served only a single grade under the plan) was most drastically affected and, under the board's closing policy, the schools in were in danger of being shut.

committee of its members to study possible changes in the elementary school assignment

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It is not the "stand alone" feature of the Finger Plan that "many years later proved inequitable due to intervening demographic changes in Oklahoma City" (Pet. 3 n.1). Threatened school closings in the black community resulted from the board's minimum enrollment policy (to which it decided it wished to adhere) rather than from the Finger Plan (which the board decided it wished to change).

Moreover, the plan distributed the burdens of desegregation inequitably from the very start: Dr. Finger would have preferred to have had the formerly black elementary schools each house two grades, not one, but based on the existing elementary attendance zones he could not match school capacities with this grade division (Tr. 296-97) and he lacked the data necessary to redraw the lines (Tr. 263, 275). Dr. Finger recognized the inequity and had expected Oklahoma City school authorities to have eliminated the inequity long before 1984 (Tr. 293). Contrary to Pet. 6 n.5, however, Dr. Finger supported "less bussing [sic] of young blacks" only "to the extent possible" "without resegregating the schools" (Tr. 297, 298) and he saw no danger to health or safety of Oklahoma City school children of any age in the pupil transportation necessitated by an adequate plan of desegregation such as the one he had devised (see Tr. 291, 197-99).

plan to address the concerns.[14] The committee recommended, and the board adopted (without seeking court approval as required by the permanent injunction, see supra note 7 & accompanying text) a modified student assignment scheme which dismantled the elementary school groupings and reinstituted the old "neighborhood school" zone lines for all grade K-4 facilities.

The board's own projections demonstrated that this new plan does more

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[14]The black board member who initiated the action was disturbed by the busing inequity and the potential black school closings (Tr. 33-35, 39-40, 49). Although he, like Dr. Finger, would have supported alterations which more evenly distributed busing burdens among black and white students (Tr. 40, 64-65, 274, 277-78), the committee considered such a plan only "[i]n our conversation . . . so far as the committee. Insofar as that being a proposal to the board, no" (Tr. 41). The committee flatly rejected any such approach because, "facing reality" (id.), it feared white flight to suburban districts or private schools (Tr. 41-43).

than create "some racially identifiable schools" (Pet. 7)(emphasis supplied). Eleven K-4 schools were expected to be more than 95% black; of these, all but two[15] were all black or virtually all black in 1971-72 prior to implementation of the Finger Plan.[16] Compare Dowell, 338 F. Supp. at 1260 n.3 with D-X 22, p. 2. Fifteen other schools would be less than 10% black. Id.

Respondents, black pupils attending Oklahoma City public schools, on February 19, 1985 sought to intervene in this

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[15]One of these two, King, was not operated in 1971-72. The other is North Highland elementary. Four other elementary schools that were virtually all-black in 1971-72 have been closed (Culbertson, Dunbar, Edison and Harmony) while three have become integrated fifth grade centers (Green Pastures, Page and Woodson).

[16]The eleven schools are Creston Hills, Dewey, Edwards, Garden Oaks, King, Lincoln, Longfellow, North Highland, Parker, Polk, and Truman.

action, to reopen the case, and to obtain preliminary injunctive relief to enforce the earlier orders.[17] The district court on March 13, 1985 set the matter down for an evidentiary hearing "at which time the question of whether this case shall be re-opened and the applicants allowed to intervene shall be tried and disposed of."[18] Following the hearing,[19] the court denied

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[17]In the conclusion to their motion, respondents asked the district court "to allow their intervention, to allow them to file an intervenors complaint, and thereafter, . . . to set an early hearing on the merits of the controversy raised herein."

[18]The Order is reprinted infra pp. 1a-2a.

[19]Petitioner is simply incorrect in stating that there was "extensive discovery on the merits" (Pet. 11 n.12). On April 8, 1985, the date originally scheduled for the hearing (which on March 27 had been delayed one week), respondents were able to take the deposition of the school superintendent, board president, the board member who proposed the change, and a school system staff member. Petitioner deposed Dr. Finger on April 13, 1985.

the motion to reopen the case and, although the issue had not been identified in the scheduling order, the court went on to sustain the constitutionality of the student reassignment plan (Pet. App. 16a-34a). Respondents appealed. The Tenth Circuit reversed and remanded (Pet. App. 1a-15a).

The Decision on Appeal

The Court of Appeals held that respondents had established grounds for allowing the suit to be reopened by demonstrating that "the defendants abandoned the Finger Plan without court approval" which they were required to seek by a permanent injunction that had never been vacated or modified (Pet. App. 13a). The Court also reviewed the record and concluded that the trial court had failed to give respondents notice that the April, 1985 hearing would deal with the underlying merits of the

controversy and had limited the proof which respondents could offer (Pet. App. 14a).

The reviewing court recognized that the district judge had, in his 1977 order relinquishing jurisdiction, used language which described Oklahoma City as having "slowly and painfully accomplished" a "unitary system" (see Pet. App. 7a, 12a) and also that the trial court could decide, on a proper motion, to modify or terminate its injunctive orders (Pet. App. 11a). Neither circumstance, it held, authorized the school board to bypass the court, however. It thus remanded the matter to allow the trial court to determine, after an evidentiary hearing, "whether the original mandatory order will be enforced or whether and to what extent it should be modified" (Pet. App. 15a).

REASONS FOR DENYING THE WRIT

I

The Judgment Below Rests Upon Rulings On Issues Other Than The Questions Presented In The Petition, Which The School Board Does Not Contest And Which Were Correctly Decided By The Court Of Appeals

In light of the unusual procedural setting of this case, described above, it is a wholly inappropriate vehicle for deciding the questions which the school board seeks to present to this Court. The judgment below rests entirely upon two key determinations by the Court of Appeals which petitioner has not asked this Court to review: (a) the district court erred in denying the motion to reopen the suit (Pet. App. 13a); (b) the district court erred in deciding the merits of the new student assignment plan because it had not given respondents adequate notice that the hearing was to cover that issue, and

respondents did not have an opportunity to offer all their relevant proof on that subject (Pet. App. 12a, 14a).

The Court of Appeals explicitly did not decide whether the board's new pupil assignment plan was constitutional but remanded for a hearing after the case was formally reopened: "Our holding should not be construed as addressing, even implicitly, the ultimate issue of the constitutionality of the defendants' new school attendance plan" (Pet. App. 15a). Since this Court reviews judgments, and not opinions, the broadly phrased "Questions Presented" in the Petition logically could have no bearing upon the Court's decision whether or not to affirm the ruling below, if it were to grant the writ. See, e.g., Belcher v. Stengel, 429 U.S. 118 (1976)(dismissing writ as improvidently

granted); Jones v. State Board of Education, 397 U.S. 31 (1970)(same); Smith v. Butler, 366 U.S. 161 (1961)(same).

Petitioner apparently does not contest the Court of Appeals' "procedural" determinations, for it has not included them among the Questions Presented which it seeks to raise. Thus, we repeat, petitioner has conceded the grounds upon which the lower court's judgment rests. Although the board appears to advance some sort of "waiver" argument to justify overlooking the dispositive procedural rulings of the court below, see Pet. 11 n.12, the facts belie this contention.[20] Indeed, respondents'

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[20]The trial court did not "inquir[e] if there was a question as to which side had the burden of proof" (Pet. 11 n.12). He simply asked, "Have you lawyers decided who should take the lead or who should put on your proof first?" Counsel for respondents replied, "We haven't, Your Honor, but we're prepared to start first" (Tr. 6). There was no discussion of the "burden of proof."

counsel explicitly confirmed their understanding of what issues were to be tried and decided at the conclusion of the hearing, after the close of proof but before the district court had ruled:

> MR. SHAW: I just wanted to confirm my understanding, that this is a hearing on a motion to reopen the case.

Similarly, while the court did ask respondents' counsel, when it was announced that respondents would not present any further evidence, "I take it that you're satisfied you've had a fair hearing" (Tr. 303), there was no basis for interpreting this question as manifesting the court's view of either the burden of proof or of the underlying substantive question. When respondents' counsel assented, the court neither announced a ruling nor invited an oral motion by the school board for judgment in its favor. He said merely: "Then, let the record show the intervenors or Applicants for Intervention now rest their case" (id.).

Finally, it is of course of no significance that respondents' counsel did not argue with the trial court's extemporaneous comments during the hearing, particularly in light of its narrow scope as set forth in the March 13, 1985 scheduling order, see supra text at n.18.

> THE COURT: It's for an evidentiary hearing to see whether or not the Court will reopen it or not. [Tr. 450.]
>
> * * *
>
> MR. SHAW: As I understand it, the hearing that we're here for, for the last two days, is while that question is raised, the question presented to the Court now is whether we prepared enough evidence to show that the case should be reopened.
>
> THE COURT: Well, I think you're probably right about that. [Tr. 451-52.]

Thus, there can be no blinking the fact that the district court unexpectedly decided the underlying substantive question (the permissibility of the board's new student assignment plan) and denied respondents a fair opportunity to challenge

that plan in a full evidentiary hearing.[21]

To be sure, the Court of Appeals' opinion discusses the district court's 1977 order and also expresses disagreement with the opinion of the Court of Appeals for the Fourth Circuit in Riddick v. School Board of Norfolk, 784 F.2d 521 (4th Cir. 1986), pet. for cert. filed, 54 U.S.L.W. 3811 (U.S. May 29, 1986). However, the Tenth Circuit's holding was a limited one: that the motion to reopen should have been granted and respondents given an opportunity, with adequate notice, to put

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[21]The Court of Appeals' conclusion that respondents' presentation of evidence was curtailed and restricted (Pet. App. 12a, 14a) is also well supported on this record. See, e.g., Tr. 164 (evidence of similarity between justifications given by board for new plan and justifications offered in 1972 for plan rejected by court not "helpful to me"), 270-71 (availability of less segregative alternatives to address inequities by modifying Finger Plan not relevant because Finger Plan "is over, done and complied with").

on their proof. That holding rests upon the Court of Appeals' fundamental determination that the provisions of the permanent injunction in this case remained in effect in 1984 and justified the effort by parties for whose benefit it was originally entered to reopen the lawsuit on the ground that the injunction had been disobeyed.

If the Court were to grant review at this time, therefore, it would be unlikely to reach and decide the Questions Presented in the Petition, because it would logically consider first -- and affirm -- the Tenth Circuit's determination that respondents were denied their day in court on those issues. Moreover, the Court traditionally decides broad constitutional questions only upon a fully developed factual record, which is lacking in this case for the same reason. Finally, review at this stage of

the proceedings would at the very least be premature since the Court of Appeals leaves to the district court in the first instance the decision whether "the original mandatory order will be enforced" (Pet. App. 15a).

II

The Substantive Questions The Board Seeks To Have Determined Are Already Raised In Riddick, A Case In Which There Was A Full And Complete Evidentiary Hearing And In Which There Are No Procedural Issues Clouding Their Resolution By This Court

This matter involves, even in the view of the petitioner,[22] no substantive issue which is not already presented to the Court

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[22] See, e.g., Pet. 13 ("Because the need for a decision by this Court is beyond serious dispute, the only significant issues are whether the Court should grant both petitions, or only one, and if only one, which it should be").

in Riddick (No. 85-1962). Often this Court benefits from reviewing more than one case presenting similar issues, since nuances and subtleties may be revealed. That possibility is absent here, however, because the instant matter is clouded by the dispositive procedural ruling upon which the judgment below rests, as we have described in Point I.

The petitioner's exhortations come down to the proposition that in its view, the Fourth Circuit was right and the Tenth Circuit was wrong (see Pet. 14), a matter which, by definition, the Court can decide adequately in Riddick.

It is certainly far from clear that the Court's consideration and analysis of the legal issues will be materially assisted by having "briefs and arguments of two sets of counsel." No legal argument is suggested in the Oklahoma City Petition

which the school board in Riddick has not already advanced. The Petition demonstrates, however, that in its zeal to bring this case to this Court on the bootstraps of Riddick, the Oklahoma City board has not only ignored the actual basis for the Court of Appeals' judgment but also has palpably misstated or exaggerated the record in significant respects.[23] For this reason, a

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[23]For example, petitioner asserts that "[t]he Board's action adopting the [student reassignment] plan was supported by a 'majority of the community' (T. 32), including the black community. (T. 432-436)." There is no discussion whatsoever of the subject on page 32 of the transcript. As to the testimony of Dr. Tommy B. White, which includes pages 432-36 of the hearing transcript, the relevant portions are as follows:

> Q You made a statement that the majority of the community supports this plan, did you not?
>
> A Yes, sir.
>
> Q The majority of what community supports this plan?
>
> A The community that was -- actually, what happens is that the or-

ganization decided that it would petition our community and the petition will demonstrate that the community does in fact --

Q My question is: The majority of what community?

A The community that we canvassed.

Q Is this canvas already completed?

A No, it certainly is not completed. [Tr. 433-34.]

Similarly, petitioner incorrectly attempts to suggest that respondents were not surprised by the trial court's ruling on the substantive merits despite the March 13, 1985 order limiting the scope of the hearing, see supra notes 20, 21 & accompanying text. Its facile statement that the new plan "did result in the creation of some racially identifiable elementary schools," although "[t]here are no [100%] one-race schools as a result of the plan" (Pet. 7, 8) obscures the dramatic resegregation worked by the student reassignment plan (compare supra text at nn.15, 16) and indicates that the school board does not appreciate the seriousness of the Fourteenth Amendment rights at stake in desegregation cases. As the district court stated at an earlier stage of this case: "The Superintendent of Schools takes the incomprehensible view that . . . a school loses its racial identity when one member of the opposite race is enrolled."

brief on the merits from this petitioner would have to be scrutinized with extra caution.

Riddick frames the issues squarely; this case simply does not, and the writ should be denied.

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338 F. Supp. at 1270 n.14.

III

On The Particular Facts Of This Case, If This Court Were To Reach The Merits It Would Be Required To Hold The Use Of The Board's Pupil Reassignment Plan Impermissible

There is another reason to deny the writ. If the decision below were a ruling on the substantive merits of the board's pupil reassignment plan, and if it were properly presented to this Court for review, application of established law to the particular facts of this case would compel the conclusion that use of the plan is impermissible.

In Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 16, 31-32 (1971) and Pasadena City Board of Education v. Spangler, 427 U.S. 424, 434-35 (1976), this Court emphasized that the remedial orders of federal courts in school desegregation cases should be limited to

correcting the effects of unlawful actions by school authorities and that they may be directed only at current conditions of segregation attributable to the intentional acts of state officials. See Keyes v. School District No. 1, Denver, 413 U.S. 189, 211 (1973)("at some point in time the relationship between past segregative acts and present segregation may become so attenuated as to be incapable of supporting a finding of de jure segregation warranting judicial intervention").

On the facts of the instant lawsuit, these prerequisites are clearly met. The connection between the virtually all-black enrollment of eleven K-4 elementary schools under the board's 1985 assignment plan, and the historic, de jure unconstitutional con-

duct of Oklahoma public authorities, is unquestioned.[24]

As described in the Statement, supra, the district court has made explicit findings in this litigation that the highly segregated residential patterns in Oklahoma City, including the overwhelmingly black northeast quadrant, result from generations of official policy -- and that mandated school segregation contributed significantly to these patterns. See supra text at nn.2-5. Because of this extensive, governmentally induced residential segrega-

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[24]As the unanimous Court observed in Swann, 402 U.S. at 28:

> "Racially neutral" ["neighborhood school"] assignment plans proposed by school authorities to a district court may be inadequate; such plans may fail to counteract the continuing effects of past school segregation resulting from discriminatory location of school sites or distortion of school sizes in order to achieve or maintain an artificial racial separation.

tion, when the school board established "neighborhood school" geographic zone lines in 1955, the traditionally black schools remained virtually all black. Dowell, 244 F. Supp. at 975, 976, 980. The Finger Plan was designed to overcome this barrier to the elimination of the dual system.[25]

The record also establishes that, because the Finger Plan was based on grouping and grade restructuring at the elementary school level and recombination into feeder patterns at the secondary level,[26] zone lines in Oklahoma City have remained basically unchanged since long prior to 1972. Under the board's 1985 plan, these

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[25]The school board's expert witness, Dr. George Henderson, testified at the hearing that both in 1972 and in 1985 it was not possible to disestablish racially identifiable schools in Oklahoma City "if you're concerned with the racial mix" because of this residential segregation (Tr. 388-89).

[26]See supra note 6.

same, longstanding "neighborhood school" zone lines became re-operative for purposes of school assignment of pupils in grades K through 4:

> Q But the School Board knew that it would be creating racially identifiable schools, even if we use your very generous definition of 90 percent?
>
> A No, we did not create those schools. Those neighborhood boundaries are the same neighborhood boundaries as have existed for years. People have chosen to live wherever they live, so that the racial -- if they're racially identifiable, that was not created by this Board. [Tr. 336 (board president).]

These zone lines today perpetuate Oklahoma City's traditionally all-black elementary schools,[27] as they did prior to 1972. Thus, the pupil segregation in the K-4 schools under the board's 1985 plan is the continuing vestige of Oklahoma City's long-

---

[27] See supra notes 15, 16 & accompanying text.

maintained policies of racial discrimination and segregation.

Conclusion

For the foregoing reasons, respondents respectfully pray that the writ be denied.

Respectfully submitted,

JULIUS L. CHAMBERS*
JAMES M. NABRIT, III
NAPOLEON B. WILLIAMS, JR.
THEODORE M. SHAW
NORMAN J. CHACHKIN
99 Hudson Street
16th Floor
New York, NY 10013
(212) 219-1900

LEWIS BARBER, JR.
Barber/Traviolia
1528 N.E. 23d St.
Oklahoma City, OK
73111
(405) 424-5201

JOHN W. WALKER
1723 Broadway
Little Rock, AR
72206
(501) 374-3758

Attorneys for Respondents

*Counsel of Record

APPENDIX

FILED March 13, 1985
Francis C. Bonsiepo
Clerk, U.S. District
Court

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF OKLAHOMA

ROBERT L. DOWELL, et al.	)	
	)	
Plaintiffs,	)	
	)	No. CIV-9452
vs.	)	
	)	
BOARD OF EDUCATION OF THE OKLAHOMA CITY PUBLIC SCHOOLS, et al.	)	
Defendants.	)	

ORDER

The court has carefully reviewed the Motion to Intervene, To Reopen Case And For Further Relief, and the Memorandum in support thereof, filed by the applicants for intervention on February 19, 1985. Likewise, the court has received and carefully reviewed Defendants' Response to Motion to Reopen Case and has concluded that before the court can make any ruling

with respect to the applicants' motion the court should conduct an evidentiary hearing. The court, therefore, concludes that the motion to intervene and reopen and the defendants' response join the issues, and the matters in them are set for evidentiary hearing at 10:00 a.m., April 8, 1985, at which time the question of whether this case shall be reopened and the applicants allowed to intervene shall be tried and disposed of.

IT IS SO ORDERED.

Dated this 13th day of March, 1985.

s/ Luther Bohannon

UNITED STATES DISTRICT JUDGE

SFP 29 1986

JOSEPH F. SPANIOL, JR.
CLERK

No. 86-326

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

THE BOARD OF EDUCATION OF THE OKLAHOMA CITY PUBLIC SCHOOLS, INDEPENDENT DISTRICT NO. 89, OKLAHOMA COUNTY, OKLAHOMA, a Public Body Corporate,
Petitioner,

v.

ROBERT L. DOWELL, *et al.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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REPLY BRIEF FOR PETITIONER

RONALD L. DAY *
FENTON, FENTON, SMITH, RENEAU & MOON
200 Court Plaza Building
228 Robert S. Kerr Avenue
Oklahoma City, OK 73102-5281
(405) 235-4671

REX E. LEE
CARTER G. PHILLIPS
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 429-4000

Counsel for Petitioners

* Counsel of Record

September 30, 1986

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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REPLY BRIEF FOR PETITIONER

In the petition for certiorari, we sought review of the Tenth Circuit's holding that a finding that a school system had achieved a unitary status did not eliminate the school's obligation to continue a court-ordered mandatory busing plan. As we explained, the Tenth Circuit's decision conflicts with a decision of the Fourth Circuit, *Riddick* v. *School Board of City of Norfolk*, 784 F.2d 521 (1986), *petition for cert. filed*, 54 U.S.L.W. 3811 (May 29, 1986) (No. 85-1962). Respondents' opposition warrants a brief reply.

1. Respondents argue primarily that there is a dispositive procedural ruling by the court of appeals which will preclude this Court from reviewing the issues presented in the Petition. Petitioner is at a complete loss to understand what independent procedural issue respondents believe is dispositive. Petitioner is seeking review of the Tenth Circuit's holding that the "unitariness" finding by the district court in 1977 had no effect on the 1972 district court order mandating student busing to achieve an integrated school system. That issue is squarely presented in this case. The holding below was that the court of appeals could "see no reason why this case should be treated differently from any other case in which the beneficiary of a mandatory injunction seeks enforcement of the relief previously accorded by the court." Pet. App. 9a. In so holding, the court recognized that the Fourth Circuit in *Riddick* had held that a previous finding of unitariness supplied a reason to hold that the mandatory busing order was dissolved, even without a specific order. Pet. App. 8a n.3.

It is completely misleading for respondents to argue that petitioner failed to challenge the holding below that "the district court erred in denying the motion to reopen the suit." Br. in Opp. 17. The decision of the court of appeals was that the motion to reopen should have been granted *because* petitioner had a continuing duty to obtain court approval before modifying the busing plan which it had not done. Pet. App. 13a. Thus, by challenging the holding that the 1972 injunction remains in effect, petitioner is necessarily challenging the sole basis for the "procedural" holding reversing the district court's denial of the motion to reopen.

Perhaps the point can be best demonstrated by comparing the outcome of this case with what would have happened if this case had arisen in the Fourth Circuit. In that circuit the district court's denial of the motion to reopen would have been reviewed solely on the basis of whether the district court abused its discretion in

finding that respondents had failed to carry their burden to show that the new busing plan was intentionally segregative. This is because in the Fourth Circuit there would have been no violation of the underlying busing decree because it was dissolved with the unitariness finding. In the Tenth Circuit, by contrast, the appellate court reversed solely because of petitioner's violation of the 1972 decree. Thus, the procedural issue is completely derivative of the legal issue which divides the circuits and which is squarely presented in both this case and *Riddick*.

2. Respondents' submission in this case is quite startling in light of the claim by the petitioners in *Riddick*, who are represented by the same counsel of record, that the *Riddick* case should be reviewed by this Court because it conflicts with the decision in this case. See Petitioners' Supplemental Brief at 7-11, *Riddick* v. *School Board of City of Norfolk*, No. 85-1962 (explaining at length the conflict in the circuits without any mention of procedural differences).

In the petition, we explained why the Court should hear both cases. Pet. 13-14. Respondents assert that "[i]t is certainly far from clear that the Court's consideration . . . will be materially assisted by having 'briefs and arguments of two sets of counsel.'" Br. in Opp. 25. They do not dispute, however, that there is a significant factual difference in the two cases concerning why the school boards decided to modify their respective busing plans.[1] The Court certainly might benefit from reviewing the issue as it arises in differing circumstances.[2]

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[1] Respondents attack (Br. in Opp. 35-39) the district court's findings that the newly instituted plan did not resegregate the schools in a way that would warrant reopening the case. But that issue is clearly not before this Court. If the Court holds that the district court correctly held that the unitariness finding required that a fresh constitutional violation must be shown, then the respondents must satisfy the strict standards for reopening the case under Rule 60(b).

[2] We respond to footnote 23 only because of the inference that respondents asked the Court to draw from it concerning the re-

For the reasons stated above and those presented in the petition, the petition in this case should be granted and the case should be heard in tandem with *Riddick*.

Respectfully submitted,

RONALD L. DAY *
FENTON, FENTON, SMITH,
RENEAU & MOON
200 Court Plaza Building
228 Robert S. Kerr Avenue
Oklahoma City, OK 73102-5281
(405) 235-4671

REX E. LEE
CARTER G. PHILLIPS
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 429-4000

Counsel for Petitioners

* Counsel of Record

September 30, 1986

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liability of petitioner's counsel. The only error revealed by that footnote is the citation to "T. 32" which should have read "T. 325". We apologize for that error, but submit that it is hardly a sufficient basis for suggesting that "a brief on the merits from this petitioner would have to be scrutinized with extra caution." Br. in Opp. 26-28.